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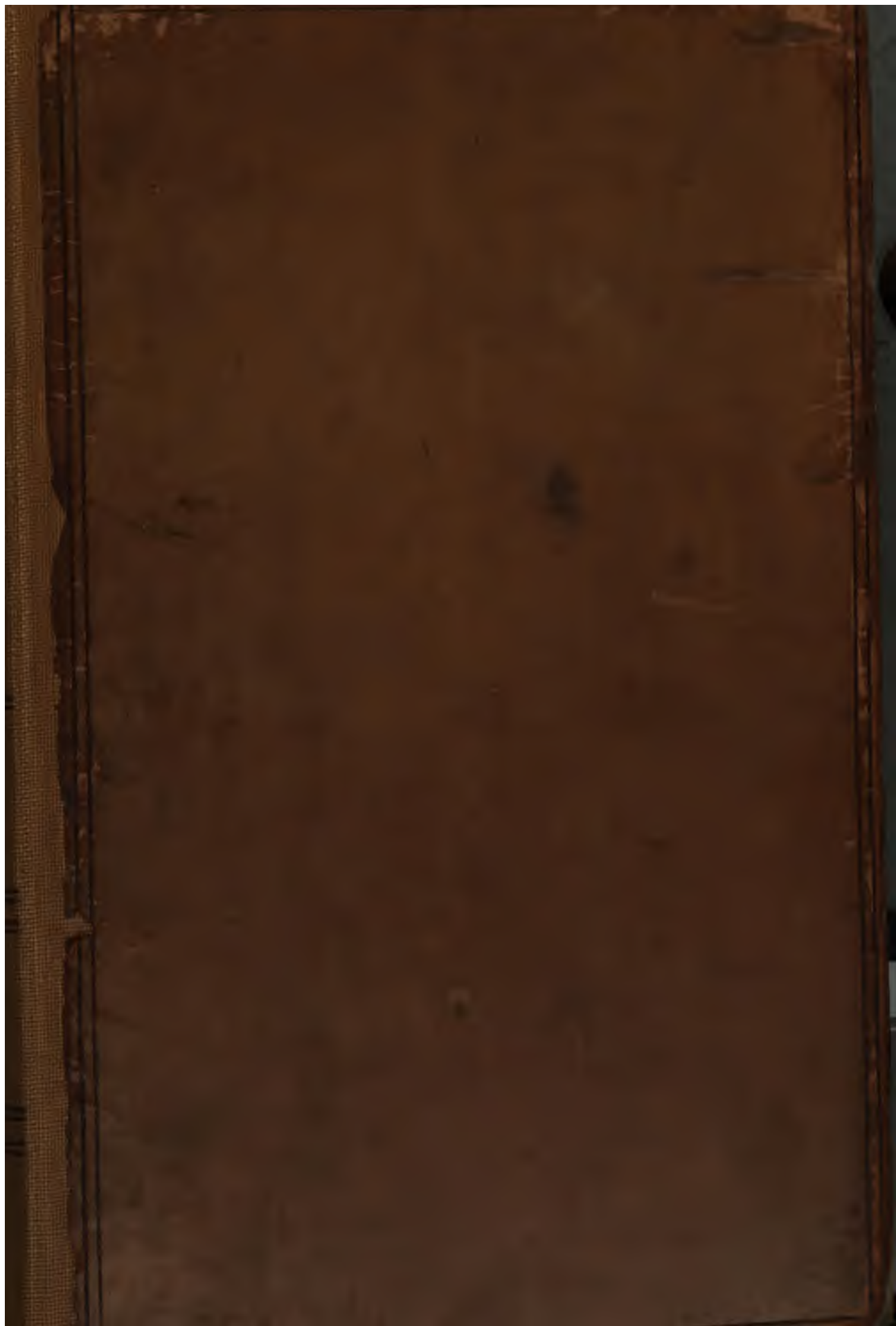
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THE
EXCHEQUER REPORTS.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

Courts of Exchequer & Exchequer Chamber.

VOL. II.

HILARY VACATION, 11 VICT. to TRINITY VACATION, 12 VICT.
BOTH INCLUSIVE.

BY

W. N. WELSBY, OF THE MIDDLE TEMPLE,
E. T. HURLSTONE, } AND { J. GORDON,
OF THE INNER TEMPLE, } OF THE MIDDLE TEMPLE,
ESQUIRES, BARRISTERS-AT-LAW.

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JUDGES
OF THE
COURT OF EXCHEQUER,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Honourable Sir FREDERICK POLLOCK, Knt., Chief Baron.

BARONS.

The Right Honourable Sir JAMES PARKE, Knt.
Sir EDWARD HALL ALDERSON, Knt.
Sir ROBERT MONSEY ROLFE, Knt.
Sir THOMAS JOSHUA PLATT, Knt.

ATTORNEY-GENERAL.—Sir JOHN JERVIS, Knt.

SOLICITORS-GENERAL.—{ Sir DAVID DUNDAS, Knt.
 { Sir JOHN ROMILLY, Knt.

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Exchequer Reports.

HILARY VACATION, 11 VICT.

1848.

WAIT and Another v. BAKER.

Feb. 5 & 7.

TROVER for 500 quarters of barley. Pleas, not guilty, and not possessed; upon which issue was joined.

At the trial, before *Williams, J.*, at the last Spring Assizes for Somersetshire, the following facts appeared:—The defendant, a corn-factor at Bristol, had occasional dealings with a person of the name of Lethbridge, who was also a corn-factor at Plymouth, and on the 5th of December, 1846, wrote to him the following letter:—

The defendant, a corn-factor, residing at Bristol, in December, 1846, wrote to one L., at Plymouth, requesting samples of barley, and to make him an offer of a cargo. In the same month L. wrote to defendant, and sent samples of barley, and

“I hear that the crop of barley in the south of Hamp-

offered to sell defendant from 400 to 500 quarters f. o. b., at Kingsbridge, or some neighbouring port, for a certain sum, for cash, on handing bill of lading, or by acceptance, &c. The defendant accepted the terms, subject to L.'s reply. L. acceded to defendant's proposal, and requested defendant to give him instructions about the vessel, in order to get her correctly insured. L. sent the defendant the charter-party (not under seal) of a vessel in which the barley was to be shipped, and which was made in L.'s name. In January, 1847, the vessel was loaded with the barley, and L. received from the master the bill of lading, by which the cargo was deliverable at Bristol to the order of L., or assigns, on payment of freight. Subsequently, L. called at the defendant's counting-house in Bristol, and left the invoice and undorsed bill of lading; he afterwards called again, when a dispute arose as to the quality of the barley; the defendant, after some further dispute, tendered the amount of the cargo in money to L., who refused to accept it, but took away the bill of lading, and indorsed it to the plaintiffs. The defendant, on the arrival of the vessel, claimed and obtained part of the cargo; but the plaintiffs, on producing the bill of lading, obtained what remained, and paid the freight. The jury found that the defendant did not refuse to accept the barley from L.; that the tender was unconditional; and that he was not an agent entrusted with the bill of lading by defendant:—*Held*, in an action of trover by the plaintiffs for the value of the barley so obtained by the defendant, that no property in the cargo passed to the defendant, either by the transaction at Bristol or by the shipment of the cargo on board the vessel by L., and that, therefore, the plaintiffs were entitled to recover.

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shire is good this year, and that at Kingsbridge the price is low, compared with the markets further eastward. If you are doing anything in the article this season, and can make me an offer of a cargo, I have no doubt but we may have a transaction. Let me hear from you in due course. Send me sample in letter, describing weight," &c.

To which Lethbridge wrote the following answer on the 9th of that month:—

"I beg to inform you that I have not yet commenced buying barley in Kingsbridge market, farmers there standing out for 10s. a bag. After Saturday's market I will send you a sample and an offer, if possible."

On the 14th, Lethbridge wrote the following letter to the defendant:—

"I herewith hand you samples of common and chevalier barley of the neighbourhood of Kingsbridge, and will engage to sell you from 400 to 500 quarters f. o. b. barley at Kingsbridge, or neighbouring port, at 40s. per quarter common, and 42s. per quarter chevalier, in equal quantities, for cash, on handing bills of lading, or acceptance at two months' date, adding interest at the rate of £5 per cent. per annum, subject to your reply by course of post."

On the 16th, the defendant returned the following reply:—

"I beg to accept your offer of 250 quarters of chevalier barley, at 42s. per quarter, and 250 quarters common, at 40s. per quarter f. o. b., for cash payments, on receipt of bill of lading and invoice, or acceptance at two months' date, adding interest at the rate of £5 per cent. per annum, subject to your reply by course of post."

On the 18th, Lethbridge wrote the defendant as follows:—

"Your favour of the 16th came duly to hand, and note by it your acceptance of my offer of barley. I suppose I

am to take up a vessel at the best possible freight I can get her for. Please instruct me in this, and say if for Bristol or any other port."

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On the 19th, the defendant wrote in answer:—

"I took it for granted that you would get a vessel for the barley I have bought of you f. o. b., and therefore did not instruct you to seek one. I trust that you will be particular to select a good ship, and at the lowest possible freight, for this port; and, above all, take care that the quality of the barley is fully equal to sample. A party, who will take part of it, is extremely particular in these matters; and the samples are sealed and held in the custody of a third party. Please to advise when you have taken up a vessel, with particulars of the port she loads in, so that I may get insurance done correctly."

After some further correspondence respecting the amount of the freight, Lethbridge wrote on the 23rd to the defendant:—

"I now send you copy of charter-party of the 'Emerald,' which vessel will sail for the port of loading to-day or to-morrow, and I will lose no time in getting her loaded."

The defendant, by letter dated the 24th, acknowledged the receipt of the charter-party (not under seal), which was dated on the 22nd, and was in the name of Lethbridge, to load at Dartmouth, a portion to be filled up at Salcombe, to proceed to Bristol, or any other port.

On the 28th, Lethbridge wrote to the defendant:—

"The 'Emerald' will commence loading to-day. I hope to hand you bill of lading in the course of the week."

And again on the 1st of January, 1847:—

"I hope to be able to send you invoice and bill of lading of 'Emerald' on Tuesday or Wednesday."

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And on the 6th of January he wrote to the defendant as follows:—

“The ‘Emerald’ is nearly loaded; expect the bill of lading to-day or to-morrow. I expect to be in Exeter on Friday, when it is very likely I shall run down and see you.”

The vessel was loaded with common and chevalier barley; and on the 7th of January, Lethbridge received from the master the bill of lading of the cargo, which was therein expressed to be deliverable at Bristol to the order of Lethbridge or assigns, paying the freight as per charter. On the 8th, Lethbridge called upon the defendant at Bristol early in the morning, and left at his counting-house the invoice and an unindorsed bill of lading. At a subsequent part of the day, Lethbridge called again upon the defendant, when the defendant raised some objections to the quality of the cargo, and asserted that it was inferior to the samples: he also threatened he would take the cargo, but sue Lethbridge for eight shillings a quarter difference. After some further dispute upon the matter, the defendant offered Lethbridge the amount of the cargo in money, and said that he accepted the cargo. Lethbridge, however, refused to accept the money and to indorse the bill of lading to the defendant; but took the bill of lading from the counter and immediately proceeded to the plaintiffs’, who were corn-factors, and had a house of business in the neighbourhood, and indorsed the bill of lading to them, and received an advance upon it. The market at that time had risen considerably. The “Emerald” arrived on the 16th, and on the 18th the defendant proceeded on board and claimed the cargo as the owner, and unshipped 1240 bushels of the barley, worth 422*l.* 14*s.*; but the plaintiffs coming on board during the time the cargo was being unshipped, presented the bill of lading and obtained the rest of the cargo, and paid the captain the freight.

The jury found that the defendant did not refuse to accept the barley from Lethbridge; that the tender was unconditional; and that Lethbridge was not an agent intrusted with the bill of lading by the defendant. His Lordship thereupon directed a verdict to be entered for the plaintiffs for 422*l.* 14*s.*, reserving leave to the defendant to enter a verdict for him.

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A rule to shew cause having been obtained,

Crowder, Barstow, and Greenwood appeared to shew cause, but were stopped by the Court, who called upon

Butt and Montague Smith, in support of the rule.—In this case the property in the barley, which came to Bristol in the “*Emerald*,” passed to the defendant. Although, in general, it is necessary, in order to pass the property in goods shipped on board a vessel, that the bill of lading should be indorsed to the party claiming the property, that is not the only mode as between vendor and vendee, where they are the parties to the original contract. And payment is not a condition precedent. Here the barley was put on board at the risk of the vendee—the vessel was hired by him, although the charter-party was made in Lethbridge’s name; and it is submitted that he was the defendant’s agent for this purpose. The vendee would have been liable for freight; the contract, although made for the vendee by the vendor, was, in this respect, the same as if it had been made by a third party. The charter-party was not under seal. In the letter of the 19th of December, the defendant requested Lethbridge to get a proper vessel, in order that he (the vendee) “might get the insurance done correctly.” It is clear that the intention of the parties was, that the vessel should be the vendee’s, and that the risk should be his. The cargo was to be free on board. There was, therefore, a delivery on board the defendant’s ship, and an appropriation of the cargo. [*Parke, B.*—At what moment

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was the acceptance of the cargo complete? Appropriation may mean that there has been a selection, or an agreement that a particular cargo shall be the thing transferred. Property never passes, unless there be some agreement to the effect that the property shall pass. By the English law, property may pass by an agreement; but the rule is otherwise in the Roman law. The property surely has passed in the present case, by the indorsement of the bill of lading, to the plaintiffs.] The lien of Lethbridge was at an end when the money was tendered at Bristol, and when the defendant said, "I accept that particular cargo of 500 quarters." [Rofe, B.—The jury do not find an unconditional tender and acceptance of the money. Alderson, B.—It is clear that what took place at Bristol was not sufficient to pass the property. You must therefore shew, independently of that proceeding, that the property passed; for the defendant there disputed the quality of the corn, and the parties did not agree as to the thing.] In *Ogle v. Atkinson(a)*, A., being indebted to the plaintiff, accepted an order to purchase goods for him of R., and put them on board the plaintiff's vessel, sent for them as the plaintiff's goods, advised him of the shipment for the plaintiff's risk and on his account, and remitted him the invoices. He procured the master to sign bills of lading to the order of blank, assuring him it was immaterial. He then drew on the plaintiff and transmitted



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lading indicated the person for whom they were to be carried. By that bill of lading the goods were to be carried by the master of the vessel for and on account of Lethbridge, to be delivered to him in case the bill of lading should not be assigned, and if it should, then to the assignee. The goods, therefore, still continued in the possession of the master of the vessel, not as in the case of a common carrier, but as a person carrying them on behalf of Lethbridge. There is no breach of duty on the part of Lethbridge, as he stipulates under the original contract that the price is to be paid on the delivery of the bill of lading. It is clearly contemplated by the original contract, that, by the bill of lading, Lethbridge should retain control over the property. It seems to me to follow that the delivery of the 500 quarters to the captain, to be delivered to Lethbridge, is not the same as a delivery of 500 quarters to a common carrier by order of the consignee. The act of delivery, therefore, in the present case, did not pass the property. Then, what subsequent act do we find which had that effect? It is admitted by the learned counsel for the defendant, that the property does not pass, unless there is a subsequent appropriation of the goods. The word *appropriation* may be understood in different senses. It may mean a selection on the part of the vendor, where he has the right to choose the article which he has to supply in performance of his contract; and the contract will shew when the word is used in that sense. Or the word may mean, that *both* parties have agreed that a certain article shall be delivered in pursuance of the contract, and yet the property may not pass in either case. For the purpose of illustrating this position, suppose a carriage is ordered to be built at a coachmaker's, he may make any one he pleases, and, if it agree with the order, the party is bound to accept it. Now suppose that, at some period subsequent to the order, a further bargain is entered into between this party and the coachbuilder,

by which it is agreed that a particular carriage shall be delivered. It would depend upon circumstances whether the property passes, or whether merely the original contract is altered from one which would have been satisfied by the delivery of any carriage answering the terms of the contract, into another contract to supply the particular carriage,—which, in the Roman law, was called *obligatio certi corporis*, where a person is bound to deliver a particular chattel, but where the property does not pass, as it never did by the Roman law, until actual delivery; although the property, after the contract, remained at the risk of the vendee, and if lost without any fault in the vendor, the vendee, and not the vendor, was the sufferer. The law of England is different: here, property does not pass until there is a bargain with respect to a specific article, and everything is done which, according to the intention of the parties to the bargain, was necessary to transfer the property in it. “*Appropriation*” may also be used in another sense, and is the one in which Mr. *Butt* uses it on the present occasion; viz. where both parties agree upon the specific article in which the property is to pass, and nothing remains to be done in order to pass it. It is contended in this case that something of that sort subsequently took place. I must own that I think the delivery on board the vessel could not be an appropriation in that sense of the word. It is an appropriation in the first sense of the word only; the vendor has made his election to deliver those 500 quarters of corn. The next question is, whether the circumstances which occurred at Bristol afterwards amount to an agreement by both parties that the property in those 500 quarters should pass. I think it is perfectly clear that there is no pretence for saying that Lethbridge agreed that the property in that corn should pass. It is clear that his object was to have the contract repudiated, and thereby to free himself from all obligation to deliver the cargo. On the other hand, as has been observed, the defendant wished to obtain the cargo, and

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also to have the power of bringing an action if the corn did not agree with the sample. It seems evident to me that, at the time when the unindorsed bill of lading was left, there was no agreement between the two parties that that specific cargo should become the property of the defendant. If that is so, the case remains, as to the question of property, exactly as it did after the original contract. There is a contract to deliver a cargo on board, and probably for an assignment of that cargo by indorsing the bill of lading to the defendant; but there was nothing which amounted to an *appropriation*, in the sense of that term which alone would pass the property. The result is, that, in this action of trover, the plaintiffs, claiming under Lethbridge by the indorsement of the bill of lading, are entitled to the property; and then Mr. Baker has his remedy against him for the non-fulfilment of his contract, which he certainly has not fulfilled.

ALDERSON, B.—I am of the same opinion. The circumstances of the case clearly shew that, when the cargo was put on board the vessel, the property in the cargo did not pass. The vendor, at that time, chooses a certain quantity of corn, which he intends to offer to the party in performance of his contract; but he keeps it as his property in the meantime. Such being the state of matters, the property in that state arrives at Bristol, and there is nothing to shew that there was any transaction which amounted to an agreement between the parties to alter that arrangement; therefore the property did not pass at all; and as the one party has not tendered the barley in discharge of his contract, the other party has his action against him.

ROLFE, B., and PLATT, B., concurred.

Rule discharged.

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HIBBERD v. KNIGHT.

Feb. 9.

COVENANT on an indenture of lease. Plea, (amongst others), non est factum.

At the trial of the cause, before *Williams, J.*, at the last Summer Assizes for Somersetshire, it appeared that the action was brought by the plaintiff, the lessee, against the defendant, the lessor, for the breach of certain covenants in an indenture of lease entered into by them. The defendant was possessed of large landed estates in this country, but resided abroad, and the management of his affairs had for a long time been in the hands of his son, who acted under a power of attorney. The lease in question was executed by the son, for the defendant, under this power of attorney. The son, who was called as a witness, failed to produce the power of attorney. A subpoena duces tecum had been served on him, but at too late a period. The learned Judge admitted secondary evidence of the contents of the power of attorney; and the plaintiff had a verdict, with leave reserved to the defendant to move to enter a nonsuit.

In an action on a covenant by lessee against lessor, where the lease had been executed by defendant's agent under a power of attorney, upon whom a subpoena duces tecum had been served, but not in proper time:—*Held*, that secondary evidence of the contents of the power of attorney ought not to be admitted.

An attorney cannot be compelled by the Court to disclose the contents of a client's deed in his possession, but if he do so willingly the evidence may be received.

Crowder having obtained a rule nisi,

Kinglelake, Serjt., now shewed cause.—This power of attorney was as material a document as the lease itself, and must be taken to have been in custody with the lease. The custody of the son was the proper custody. There was evidence that he alone managed all the business, and that his father never interfered. [*Rolfe, B.*—The lessor is the most unlikely person to have the lease. *Alderson, B.*—Of the three parties, either the lessee or his attorney would properly have the custody of it.] The service of a subpoena duces tecum was not necessary.

Crowder, contra, was not called upon.

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PARKE, B.—The rule in this case must be made absolute. This power of attorney is the deed of the attorney to whom it was given, and he is to keep it, and under it to shew that he has authority for what he has done. The witness should have been duly served with a subpoena duces tecum; and in case he had not produced the deed, he might have been punished. The case of *Marston v. Downes* (a) is often referred to. There a witness, an attorney, refused to produce a title-deed because it was his client's, but he told the contents of the deed willingly. My brother *Ludlow* objected to the evidence, not on the ground that the attorney was privileged, but that no secondary evidence could be given of the deed, which was itself in existence. My brother *Patteson* ruled that secondary evidence might be given, as the party was not obliged to give up his deeds, and that, if the attorney did not insist upon his privilege, but chose willingly to disclose the contents of them, the evidence might be received. Thus explained, the case is correct. Where a deed is in the possession of a person which he is not obliged to produce under a subpoena duces tecum, you may give secondary evidence of its contents, as you have done everything to obtain it. The cases of *Ditcher v. Kenrick* (b), and *Doe d. Gilbert v. Ross* (c), are authorities which shew this.

ALDERSON, B.—The second point in the case of *Marston v. Downes* requires explanation. It would seem, from the report of that case, that an attorney can be compelled by the Court to divulge the contents of his client's deed. The Court will hear him, and receive his evidence, if he does so *willingly*, but the Court cannot insist upon it.

ROLFE, B., and PLATT, B., concurred.

Rule absolute.

(a) 6 C. & P. 381.

(b) 1 C. & P. 161.

(c) 7 M. & W. 102.

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HOOPER v. WILLIAMS.

Feb. 5.

THE declaration stated, that the defendant, on the 12th of November, A.D. 1846, made his promissory note in writing, and thereby promised to pay to the bearer thereof £150 for value received two months after the date thereof, which period had elapsed before the commencement of this suit; and the defendant then delivered the said note to one J. Kent, who thereby became the bearer thereof, and who indorsed and delivered it to the plaintiff, who thereby became the bearer thereof; whereof the defendant then had notice, and then, in consideration of the premises, promised to pay the amount of the note to the plaintiff according to the tenor and effect thereof.—Breach, non-payment.

The defendant pleaded, that he did not make the note.

At the trial, before Lord *Denman*, C. J., at the Surrey Spring Assizes, 1847, the plaintiff gave in evidence the following note:—

“Camberwell, Nov. 12, 1846.

“Two months after date, I promise to pay to my own order £150, value received.

“JAMES WILLIAMS.”

The note, which bore a 4s. 6d. stamp, was indorsed in blank by the defendant, and afterwards by J. Kent. It was objected, on the part of the defendant, that the instru-

A declaration alleged that the defendant made his promissory note in writing, and thereby promised to pay to the bearer thereof £150, two months after date, and delivered the note to K., who thereby became the bearer thereof, and who indorsed and delivered it to the plaintiff, who thereby became the bearer thereof. At the trial, the plaintiff produced in evidence a note payable to the defendant's own order, and indorsed by him in blank, and afterwards indorsed by K. The note bore a 4s. 6d. stamp:—*Held*, that though until indorsement the note was an incomplete instrument, upon which no right

to sue could exist, yet the effect of the indorsement was to render it a valid promissory note payable to bearer, and consequently it was properly described in the declaration, and properly stamped.

Such a note, before indorsement, amounts to a promise to pay the sum therein mentioned to the person to whom the maker should afterwards by indorsement order it to be paid, such indorsement being intended to have the same operation as if put on a complete note. If the indorsement should be to a particular person, or to A. B. or his order, it would be a note payable to that person, or to A. B. or his order; and if in blank, it would be payable to bearer, in like manner as a sum secured by a complete note would have been by similar indorsement:—*Semble*, that the holder might fill up the blank indorsement by writing over it his own name, and so make it payable to himself.

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ment given in evidence was not a promissory note within the stat. 3 & 4 Anne, c. 9, and that it did not support the declaration; also, that it should have been stamped as an agreement; or if the indorsement by the defendant were treated as a new contract, then a new stamp would be requisite. The learned Judge directed a nonsuit, reserving leave for the plaintiff to move to enter a verdict for him for the amount of the note.

Channell, Serjt., in last Easter Term, obtained a rule nisi accordingly; against which,

Montagu Chambers and *Ogle* shewed cause in Hilary Term (January 18).—The instrument given in evidence is not a promissory note within the 3 & 4 Anne, c. 9, s. 1. The same point was decided by this Court in the case of *Flight v. Maclean* (a). There the first count of the declaration stated, that the defendant made his promissory note in writing, and thereby promised to pay to the order of the defendant £500, two months after date, and indorsed the same to the plaintiff. To that count there was a special demurrer, on the ground that a note payable to the maker's order was not a legal instrument, and could not be negotiated. The Court held the count bad, as the instrument declared on was not a promissory note within the statute of Anne. A contrary decision, however, was come to by the Court of Queen's Bench, in a subsequent case of *Wood v. Mytton* (b). There the declaration was in the same form, and, after verdict for the plaintiff, a motion was made to arrest the judgment, on the ground that a note payable to the order of the maker was not a negotiable instrument; and therefore that, on the face of the declaration, no title or right of action in the plaintiff was shewn. The Court discharged the rule, holding that

(a) 16 M. & W. 51.

(b) T. T., 1847, June 4, 13; 16 Law J., Q. B., 446.

such a note was within the statute of Anne, and assignable by indorsement. If that decision be correct, from what time would the Statute of Limitations begin to run—whether from the date of the note or the time of the indorsement? It will be argued on the other side, that, assuming the promise by the maker of the note to pay himself was invalid, still, when he indorsed his name upon the instrument, it became a valid promissory note, payable to bearer; but the indorsement imports that he has given an order to that person whom he agrees to pay, not to the bearer. The cases relating to the effect of an indorsement of an incomplete instrument arose on bills of exchange, which, as observed by Lord Mansfield in *Heylyn v. Adamson* (a), bear no similitude to promissory notes. *Pearson v. Garrett* (b) is an authority to shew that a note in this form would have been void before the statute of Anne; and that act gives no right to sue on it as if payable to bearer. The plaintiff should have declared on the original contract, and then the note would have been good evidence of it: *Clerke v. Martin* (c). The instrument is improperly described in the declaration as a note payable to bearer: *Burmester v. Hogarth* (d). But if the decision of the Court of Queen's Bench in *Wood v. Mytton* be correct, and this note is within the statute of Anne, the declaration should have stated it as a note payable to the maker's own order. A similar note was so declared on in *Isaac v. Farrar* (e). At all events, if the effect of the indorsement was to render the instrument a note payable to bearer, it would require a new stamp.

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J. Brown, in support of the rule.—In *Flight v. Maclean* (f) this point was not fully discussed; it became unnecessary to do so, as the plaintiff was entitled to judgment at all events on

(a) 2 Bur. 676.

(b) 4 Mod. 242.

(c) 2 Lord Raym. 757.

(d) 11 M. & W. 97.

(e) 1 M. & W. 65.

(f) 16 M. & W. 53.

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one of the counts. When a promissory note is made payable to the maker's own order, and he indorses it, it becomes in legal effect a note payable to bearer, and so falls within the statute of Anne. It is competent for the holder to write above the indorsement, "pay to bearer." That is evident from the case of *Lucas v. Marsh*(a), which was an action by the indorsee of a promissory note, and on the trial the note was produced, indorsed by the drawer, and not superscribed. And the question on the point reserved was, whether or no, after the objection taken, the indorsement to the plaintiff could be supplied by the Court. It was held that the words "pay the contents," &c., might be put or set over the name indorsed in court. The property is transferred by the indorsement, and where the indorsement appears to be superscribed, the Court never inquires when the superscription was written. *More v. Manning*(b) is an authority to the same effect. When the maker of a note promises to pay to his own order, it is the same as if he had said, "I will pay to the person I order." Then the effect of his indorsement is to order payment to bearer, and so the instrument becomes in terms a promissory note payable to bearer. The superscription has relation to the time of the indorsement; until then the instrument remains wholly inoperative. *Cruchley v. Clarence*(c) decided that a bill of exchange, drawn and issued in blank for the name of the payee, may be filled up by a bonâ fide holder with his own name. *Le Blanc, J.*, there says,—“It is the same thing as if the defendant had made the bill payable to bearer.” In *Peacock v. Rhodes*(d), Lord Mansfield says,—“I see no difference between a note indorsed in blank and one payable to bearer. They both go by delivery, and possession proves property in both cases.” In *Chitty on Bills*(e), it is said that an indorsement in

(a) Barnes, 453.

(b) 1 Comyns, 311.

(c) 2 M. & Sel. 90.

(d) 2 Doug. 60.

(e) P. 229, 9th ed.

blank is sufficient to transfer the right of action to any bonâ fide holder, and, so long as it continues in blank, makes the bill or note payable to bearer. This instrument must have been intended to operate in some way; and if it can only operate by being payable to bearer, the Court will give it that construction, upon the principle acted upon by the House of Lords in the case of *Gibson v. Minet* (a). There a bill of exchange was drawn in favour of a fictitious payee, with the knowledge as well of the acceptor as the drawer, and the name of such payee was indorsed on it by the drawer, with the knowledge of the acceptor, which fictitious indorsement purported to be to the drawer himself or his order, and then the drawer indorsed the bill to an innocent indorsee for a valuable consideration; and it was held, that the latter might recover against the acceptor as on a bill payable to bearer. *Hotham, B.*, there says, "It having been found, then, that the plaintiffs in error knew at the time of their acceptance that the name of John White was a mere fiction, they must be presumed to have known more, namely, that no regular or formal title could ever be traced through him by any holder of the bill. If, therefore, they have accepted a bill, which they knew was so framed as to be incapable of being proved in the shape it bore, they shall nevertheless be held to their undertaking to pay it, though it be presented to them in another; because they themselves have induced such necessity; for it is a known rule of law that no man shall take advantage of his own wrong." *Gould, J.*, says, "As it appears that the drawers and drawees knew that no such person as John White existed, and therefore that it was impossible that there should be such an indorsement as the bill literally seems to require, and, consequently, that it could never have been intended that there should be such an indorsement, I think that must be rejected as surplusage and repugnant. The bill will then stand as a direction to pay *to order*; and supposing it to

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(a) 1 H. Blac. 569.

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have been drawn in that form, to pay to order, I consider the word *our* must have been supplied by a necessary *sub-intelligitur*, and then, the bill being indorsed to the plaintiffs for a full and valuable consideration, they became the bonâ fide holders, and, upon this construction, clearly entitled to recover against the acceptors." So here, the indorsement being in blank, its legal effect is to make the note payable to bearer until otherwise filled up, and then payable to order. A bill will be valid where there is only one party to it; for a man may draw on himself, payable to his own order: Chitty on Bills, 9th ed., p. 24; Story on Bills, s. 35. The Court will put a liberal construction on the statute of Anne: *Oridge v. Sherborne* (a). The Statute of Limitations would not run until there was a cause of action, that is, after indorsement. This being, then, a promissory note payable to bearer, is properly described in the declaration. *Edis v. Berry* (b) decided that, where an instrument is so ambiguous in terms as to make it doubtful whether it be a bill of exchange or promissory note, the holder may, at his election, (as against the maker of the instrument), treat it as either. Assuming, then, that this instrument became, by indorsement, a valid note payable to bearer, no new stamp would be requisite, for, until indorsement, it had no operation as a promissory note.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—In this case, we think the rule to enter a verdict for the plaintiff should be made absolute. The plaintiff declared on a note for £150 at two months, made by the defendant, and payable to bearer, which the defendant delivered to one J. K. Kent, and Kent indorsed to the plaintiff. The defendant pleaded, that he did not make the note. On the trial, the plaintiff produced a note corresponding in date, made by the defendant, whereby he promised to pay to his own order £150, two months after date.

(a) 11 M. & W. 374.

(b) 6 B. & C. 433.

The note was indorsed in blank by the defendant, and afterwards by J. K. Kent. My Brother *Channell* objected to the receipt of the note in evidence, on the ground of variance, and that it was not a note within the stat. 3 & 4 Anne, c. 9, and not obligatory as a note; and if so, that it required a stamp as an agreement, or that the indorsement by Kent made it a new note, so that it required a new note stamp. Lord *Denman* allowed the objections, reserving the points. On shewing cause the principal question was, what the effect of this instrument was as it stood originally before it was indorsed, and whether it was, within the stat. 3 & 4 Anne, c. 9, a good and valid note, payable to the order of the maker. The opinion of this Court and that of the Queen's Bench, as to this point, are at variance with one another. In *Flight v. Maclean*, this Court held, on special demurrer to the first count of a declaration stating a note payable to the order of the maker, and indorsed to the plaintiff, that the count was bad, such a note not being within the statute of Anne. The case of *Wood v. Mytton* afterwards came on in the Queen's Bench. It was an action on a similar note indorsed to the plaintiff. After verdict for the plaintiff, a motion was made in arrest of judgment; and the Court discharged the rule, holding, after a minute examination of all the provisions of the statute of Anne, that such a note was within that statute, and assignable by indorsement. Though these decisions are not at variance, as will be afterwards explained, the construction of the statute by the two Courts differs. After a careful perusal of the statute, we must say that we do not think that it ever contemplated the case of notes payable to the maker's order, which are incomplete instruments, and have no binding effect on any one till indorsed. The Court of Queen's Bench thought, that though the first part of the first section of the statute of Anne applied only to notes payable to another person, or his order, or to bearer, which notes it makes obligatory between the parties, yet that the second part applies to every note

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payable to *any* person, and therefore includes a note payable to the maker or his order. It appears to us that this is not the meaning of this part of the section, which is, as we think, intended to make those instruments, to which it had previously given an obligatory effect between the original parties, transferable to third persons, so as to enable them to sue upon them as upon the transfer of bills of exchange. The previous part of the section had given to the payee, when the note was made payable to another person; or to another person or order; and to the bearer, whoever at any time he might be, a right to sue; thus providing entirely for notes payable to bearer, whether in the hands of the original or a subsequent bearer. And then the section proceeds to make the class of notes payable to a person or order transferable. We think that the legislature, by the second part of the section, could only mean to make that instrument, which gave a right to *sue*, assignable; and no right to sue could exist in any one, in the case of a note payable to the maker's order, until the order was made in the shape of an indorsement: until that indorsement was made, it was an imperfect instrument, and, in truth, not a promissory note at all, and consequently not transferable under the statute. What, then, is the effect of the indorsement to another person? We think it was to perfect the incomplete instrument, so that the original writing and indorsement taken together became a binding contract, though an informal one, between the maker and the indorsee, and then, and not till then, it became an assignable note.

It is well settled, that no particular form of words is necessary to constitute a promissory note. If a man draws an instrument in the form of a bill of exchange on himself, and accepts it, it is a promissory note. If he says, "I pay to A. B. £100," and adds an address to the instrument, it may be declared on as a note. What, then, is the meaning of the instrument in question? Before the indorsement, it may be considered to be a promise to pay £150, two months after date, to the person to whom

the maker should afterwards, by indorsement, order the amount to be paid, such indorsement being intended to have the same operation as if put on a complete note. If, then, the indorsement should be to a particular person, or to A. B. or his order, it would be a note payable to that person, or to A. B. or his order; and if in blank, it would be payable to bearer, in like manner as a sum secured by a complete note would have been by similar indorsements. It may follow as a consequence, that the holder might fill up the blank indorsement by writing over it his own name, and so make it payable to himself, although it is not necessary to determine that point; and, reading the note as payable to bearer, any one may afterwards indorse his own name, and so make himself liable to subsequent holders, as the indorser of a complete note payable to bearer would do: Story on Notes, s. 132.

It appears to us, then, that the instrument in this case was, when it first became a binding promissory note, a note payable to bearer, and consequently was properly described in the declaration.

This view of the case reconciles the decision of this Court in *Flight v. Maclean* with that of the Queen's Bench in *Wood v. Mytton*; but not the reasons given for those decisions. In the case in this court, the declaration was bad on special demurrer, as it did not set out the legal effect of the instrument. In that in the Queen's Bench, the motion being for arrest of judgment, the declaration was, in substance, good; for it set out an inartificial contract, which had the legal effect of a valid note payable, as stated on the record, to the plaintiff.

The difference between the two Courts in the construction of the statute is of no practical consequence, as, in our view of the case, securities in this informal, not to say absurd, form, are still not invalid; and it might be of much inconvenience if they were, for there is no doubt that this form of note, probably introduced long after the statute of Anne, and for what good reason no one can tell, has become of late

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years exceedingly common; and it is obvious that, until they are indorsed, they must always remain in the hands of the maker himself, and so he can never be liable upon them.

The objection to the stamp, in our view of the case, cannot prevail, as the note was a valid note at two months, payable to bearer as soon as the indorsement was put upon it; and our judgment is, that the rule be made absolute.

Rule absolute.

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MOON v. DURDEN.

The 18th section of the 8 & 9 Vict. c. 109, which received the royal assent on the 8th of August, 1845, enacts, that "all contracts and agreements by way of gaming or wagering shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event upon

ASSUMPSIT.—The declaration, which bore date the 1st of December, A.D. 1845, stated that the defendant had been summoned by virtue of a writ issued on the 12th of June, A.D. 1845. It then alleged, "that, before and at the time of the making of the agreement and promise of the defendant, a certain race for certain stakes of great value, to wit, the sum of 2000*l.*, had been run over the Epsom race-course, to wit, at Epsom, and a certain horse called Running Rein, and a certain other horse called Orlando, and also certain other horses, had then run the said race, over the said race-course, for the said stakes; and the said horse called Running Rein had then reached the winning-post before the other horses so running as aforesaid, and had beaten them, the said other horses, by speed; and after the running of the said race, and before and at the time of the making of the agreement and the promise of the defendant, a certain question and dispute then arose as to which any wager shall have been made:" — *Held*, per *Parke, B., Alderson, B., and Rolfe, B.*, (*Platt, B.*, dissentiente), that the statute had not a retrospective operation, so as to defeat an action for a wager, commenced before the statute passed.

Quere, whether, by the first part of the section, the legislature intended to put at once an end to the legal obligation both of existing and future wagering contracts, leaving the parties to all such wagers to act thereafter on them as honourable engagements alone.

The general rule in construing recent statutes is, "*Nova constitutio futuris formam imponere debet, non præteritis*;" but that rule, which is one of construction only, will yield to a sufficiently expressed intention of the legislature that the enactment should have a retrospective operation.

whether the said Running Rein was duly qualified or not for the running and for being entered to run the race, and as to whether the said Running Rein was or was not duly entitled to the said stakes, and duly qualified to be the winner thereof, and as to whether the said Running Rein would or would not obtain the said stakes; and thereupon heretofore, to wit, on the 22nd of May, A.D. 1844, it was agreed by and between the plaintiff and the defendant, that if the said horse called Running Rein should obtain the said stakes, on account of having run the said race, the plaintiff should pay to the defendant the sum of 5*l.*; but that if the said horse called Running Rein should not obtain the said stakes for having run the said race, he (the defendant) should pay to the plaintiff the sum of 50*l.*" The declaration then alleged mutual promises, and averred that "the said Running Rein never did nor has obtained the said stakes for having run the said race, but that, on the contrary thereof, the said stakes were obtained by and given to the owner of the said other horse called Orlando." —Breach, non-payment of the said sum of 50*l.*

Demurrer, and joinder.

Lush argued in support of the demurrer in last Michaelmas Vacation, (Dec. 8).—The 8 & 9 Vict. c. 109, s. 18, enacts, "That all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." The first branch of the section is, no doubt, prospective only; but the second is retrospective. If the legislature had only intended to prohibit future wagering contracts, it would have been sufficient to have declared them "null and void;" but the second branch of the clause, which says that "no suit shall be brought or *maintained*," clearly shews that the

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enactment was intended to have a retrospective operation. The word "maintained," when used with reference to actions, means "continued" after they have been brought. [*Parke, B.*—Is not the true construction this—"no action shall hereafter be brought, or, if brought, shall be maintained?"] In that view, no effect would be given to the latter part of the section, and the legislature must have intended something more; for it would be useless to enact that no action should be "brought" or "maintained" upon a contract already declared null and void. Besides, the subsequent words are, "for recovering money or other valuable thing which *shall have been deposited*." If intended to apply to future transactions only, the words would have been, "which *shall be deposited*." Notwithstanding the general rule as to the prospective effect of recent statutes, there are cases in which new enactments have been held to apply to past transactions. Where a plaintiff sued, in Hilary Term, 1829, on a debt which accrued more than six years before, the Court of Common Pleas held that the 9 Geo. 4, c. 14, which came into operation on the 1st of January, 1829, precluded him from recovering on an oral promise to pay the debt made by the defendant in February, 1828: *Towler v. Chatterton* (a). In the judgment in that case, reference is made to two *Nisi Prius* decisions, one before *Hullock, B.*, and the other before Lord *Tenterden*, in which those learned judges ruled that the statute applied to the case of actions brought before the 1st of January, 1829, but in which the trials did not take place until after that time; although the effect of such a construction was to deprive the parties of their vested right to recover the debts. The case of *Edmonds v. Lawley* (b), in which it was held that the 2 & 3 Vict. c. 29, s. 2, was not retrospective, is distinguishable, because the words of that statute are general, and capable of an interpretation either way. Here the word "maintained" has been advisedly

(a) 6 Bing. 238.

(b) 6 M. & W. 263.

used by the legislature for the purpose of stopping wagering suits already commenced. Any other interpretation would be equivalent to striking that word out of the section. [*Parke, B.*—The case of *Edmonds v. Lawley* is decisive in principle. The Court there held, that if a fiat had issued, and assignees had been appointed before the passing of the 2 & 3 Vict. c. 29, s. 2, they would have had a vested right to the property of the bankrupt from the time of the seizure; and it would be unjust to construe the act so as to defeat that right. In *Nelstrop v. Scarisbrick (a)* we also held that the statute ought to be construed so as to give effect to vested rights; and that decision was confirmed by *Moore v. Phillips (b)*.] The object of the 8 & 9 Vict. c. 109, was to prevent parties from making courts of law instrumental in recovering wagers; and that can only be done by giving the statute a retrospective effect.

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Bramwell, contrà.—The enactment is prospective only. If the latter part of the section be read as applying to those contracts which are annulled in the former part, the whole is consistent. The construction will then be that all wagering contracts shall be null and void, and no action shall be brought or maintained in respect of them. To hold that the word “maintained” does not apply to all actions to which the word “brought” applies, would be to hold that the legislature has prohibited the “bringing” of an action independently of the “maintaining” of it. But no statute can prevent the “bringing,” though it may the “maintaining” of an action. The true construction, therefore is, “no action shall be *brought*, or being brought, *maintained*.” The first part of the section puts an end to suits between the parties to wagers; the second part relates to stakeholders, who would otherwise be liable to actions for the recovery of a thing, in specie or money, deposited with them to abide the event of wagers. If, in this case, the statute had passed after verdict, and before judgment, according to the argument on

(a) 6 M. & W. 684.

(b) 7 M. & W. 536.

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the other side, it would have been illegal to enter up judgment. The 15th section repeals certain statutes relating to gaming, except as to penalties incurred before a certain day. Then the 16th section enables persons, sued for penalties, to obtain an order to discontinue, on payment of costs. But the statute contains no provision for discontinuing actions for wagers already commenced, which shows that the legislature did not intend to defeat existing rights in that respect. Where the law is altered by statute, pending an action, the law as it existed when the action was commenced must decide the rights of the parties, unless the legislature, by the language used, show a clear intention to vary the mutual relation of such parties: *Hitchcock v. Wray* (a).

Lush replied.

Cur. adv. vult.

The Court having differed in opinion, the learned judges now delivered their judgments *seriatim*.

PLATT, B.—This action was brought on the 12th of June, 1845. In December, 1845, the plaintiff declared upon a wager alleged to have been won on a horse-race. The defendant demurred to the declaration. The question raised by this demurrer is, whether the plaintiff was barred, by the 18th section of the 8 & 9 Vict. c. 109, from maintaining his action. The statute received the royal assent on the 8th of August, 1845; and the 18th section enacts, “that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, should be null and void; and that no suit should be brought *or maintained* in any court of law or equity, for recovering any sum of money or valuable thing, alleged to be won upon any wager, or which should have been deposited in the hands of any person to abide the event on which any wager should have been made.”

The general rule, governing the construction of statutes,

(a) 6 Ad. & Ell. 943.

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statute he had covenanted not to do, or which forbids his doing an act, which he had before the passing of the statute covenanted to do, repeals the covenant: *Brewster v. Kitchell* (a). The 9 Geo. 4, c. 14, s. 1, enacts, "that in actions grounded on any simple contract, no acknowledgment or promise shall be deemed sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of the 21 Jac. 1, c. 16, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable." That statute was to take effect on and after the 1st of January, 1829, and has been construed to render insufficient all proof, adduced after the 31st of December, 1828, of an unwritten acknowledgment or promise; although, by such a construction, the statute is made to operate retrospectively, in avoidance of all acknowledgments and promises expressed before the 1st of January, 1829: *Towler v. Chatterton* (b), *Ansell v. Ansell* (c), *Cunner v. Cattle* (d). By the 3 & 4 Will. 4, c. 42, s. 31, personal representatives failing in their suits are subject to costs. This statute has been held, by the Courts of Queen's Bench and Exchequer, to operate retrospectively, and to render executors and administrators who had brought their actions before it passed, liable: *Freeman v. Moyes* (e), *Pickup v. Wharton* (f), *Grant v. Kemp* (g). The former of these two statutes intended to abolish an unsatisfactory means of proof; and the latter, the anomaly of allowing a plaintiff, because he sued in a representative character, to escape the just penalty of paying the costs occasioned by his having brought a desperate and ill-founded action.

The 8 & 9 Vict. c. 109, intended to prevent for the future her Majesty's courts of justice from being required to execute the unworthy office of deciding a gambling controversy, or of compelling, by their process, the payment of a wager.

(a) 1 Salk. 198.

(b) 3 M. & P. 619.

(c) 3 C. & P. 563.

(d) 2 M. & P. 367; 9 Bing. 258.

(e) 1 Ad. & Ell. 338.

(f) 2 C. & M. 405.

(g) Id. 636.

By adhering to the express provisions of the 9 Geo. 4, c. 14, s. 1, and the 3 & 4 Will. 4, c. 42, s. 31, the Courts have applied the remedies intended.

By a like course alone will this Court accomplish the object of the legislature in penning the 18th section of the 8 & 9 Vict. c. 109. In that section the legislature appears to me to have intended to deal with subsisting, as well as with future, contracts by way of gaming or wagering. After annulling future contracts of that description, any further provision as to them, or as to any proceedings upon them, was unnecessary. The enacting part of the section might have stopped at the end of the declaration that such contracts should be null and void. The next provision, therefore, must be taken to deal with money or other valuable things alleged to be won upon such wagering contracts as subsisted on the 8th of August, 1845; and as to them, to incapacitate the winner from bringing or maintaining in any court of law or equity a suit for their recovery. The words are, "and that no suit shall be brought *or maintained* in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which *shall have been* deposited in the hands of any person to abide the event on which any wager *shall have been* made." In any way of reading this part of the section, it is impossible to prevent its operating to defeat the rights vested in the winners to recover, if they shall have failed to bring their actions before the 8th of August, 1845. But upon what principle can it be urged, that one of two persons, each having won a bet on the same day, and upon the same event, shall be entitled to recover, because he shall have brought his suit the day next before the act received the royal assent; and the other, who shall have brought his suit two days later, shall be barred altogether? It seems to me that the legislature, contemplating the injustice of allowing such a distinction, has advisedly introduced the words "or maintained," in order to extend equally to both the incapacity to recover. The legislature has used the

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word "maintained" alternatively: are we to say it has no distinct meaning? Dixit: are we to say non voluit? The verb "to maintain," in pleading, has a distinct technical signification. It signifies to support what has already been brought into existence. Thus, a defendant, who admits the right of a plaintiff to bring, or to bring and up to the last pleading maintain, his action, but relies on matter disabling him from further proceeding, insists that the plaintiff ought not, by reason of such matter, further to maintain his action. A plea in bar of the further maintenance of the action admits the plaintiff to have properly maintained it up to the time of such plea. In this case, however, the defendant, by his demurrer, objects to the declaration. He says, "Your action was brought properly; but you have no right to maintain it by your declaration, or, in other words, the law has intervened and deprived you of that right." The like intervention deprived the plaintiff in *Kirkhaugh v. Herbert*, and the anonymous case also referred to in 6 Bing. 265, of his right of action, and in *Grant v. Kemp (a)* and *Freeman v. Moyes (b)* of his immunity from the defendant's costs.

In confirmation of the view which I have taken of the 18th section, it should be observed, that the expressions "shall have been deposited" and "shall have been made" appear to have been selected in contradistinction to the words "shall be." If the section was intended to operate prospectively only, the words "shall be" would have been appropriate to its object; but if retrospectively, the words "shall have been" would be not only appropriate, but necessary.

The 15th section repealed various legislative provisions against gaming, except as to any penalties incurred on or before the 5th of March, 1844, and for recovering which any suit should have been commenced before the 5th of March in that year. By the 16th section, it is made lawful for any person sued for recovery of any pecuniary penalty incurred on or before the 8th of August, 1845, under the

(a) 2 C. & M. 636.

(b) 1 Ad. & Ell. 338.

provisions of any act amended or repealed by former sections, to apply to the Court or a judge for an order that such action shall be discontinued upon payment of the costs incurred on or before the 5th of March, 1844; and every such Court or judge is required to make such order, and, upon the making such order, and payment or tender of such costs, the action is to be discontinued. The effect of these two sections is to deprive the informer of the penalty in every case altogether, and to impose upon him the payment of the whole of his own costs, if he shall not have brought his action for its recovery on or before the 5th of March, 1844; and of so much of them as he shall have incurred during the fifteen months next before the passing of the act, if he shall have brought his action on or before that day.

The relief extended by these sections was to the guilty. Those who had not incurred penalties did not require it. I cannot suppose that the legislature proposed to extend to the gambler suing for money won, protection which it denied to the informer suing for penalties incurred, and which had been imposed on persons guilty of deceitful gaming, and to which the law had given him a distinct title. Yet, if the word "maintain" in the 18th section is to be treated as redundant, and is not to be understood to apply to actions pending, the gambler may recover in his action on a wager, while the informer would be barred from maintaining his action, and would be entitled to a portion only of his costs, should he have been so fortunate as to have done what probably no informer, suing for penalties on the 8th of August, 1845, had done, namely, brought his action on or before the 5th of March, 1844. Practically, the 15th section stripped the informer of the right with which the law had deliberately clothed him, without giving him any compensation for the loss of the penalty or of his costs. And, although it is impossible to escape from giving to the 15th and 16th sections a retrospective operation, the Court is called upon to conclude that the 18th section was not

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intended to operate as extensively against the gambler, and in order to arrive at that conclusion, to treat as surplusage, or, in other words, to annul, the plainly additional enactment contained in that section.

Upon the whole, taking into consideration the general spirit of the act, and the nuisance the legislature sought, by the 18th section, to abate, I think they intended that, from the 8th of August, 1845, when the act received the royal assent, her Majesty's courts of law and equity should not be made instrumental in enforcing the payment of a wager; that the supposed vested rights of winners to recover were not contemplated as subjects of legislative protection, but, on the contrary, were absolutely annulled; that, from and after the 8th of August, the winners were barred from bringing, or, if they had then brought them, from maintaining, suits either at law or in equity, to recover the money or valuable thing alleged to be won; and, consequently, that the defendant is entitled to judgment.

ROLFE, B.—This was an action on a wager. It was commenced on the 12th of June, 1845; and the main question in the case is, whether the effect of the stat. 8 & 9 Vict. c. 109, s. 18, is to disable the plaintiff from maintaining the action. That statute did not receive the royal assent until August, 1845, after this action had been commenced.

The language of the 18th section is as follows:—"And be it enacted, that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to decide the event on which any wager shall have been made."

The effect of this clause is to make void all wagers, and to prevent the bringing or maintaining any action for the recovery of money won on any wager; and the only question

is, whether its operation is retrospective, so as to affect past transactions and existing suits.

The general rule on this subject is stated by Lord Coke, in the second Institute, 292, in his Commentary on the Statute of Gloucester, "*Nova constitutio futuris formam imponere debet, non præteritis*;" and the principle is one of such obvious convenience and justice, that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the legislature meant it to operate retrospectively.

On the part of the defendant it was argued, that in this statute the clause must have been intended to affect past transactions; because it not only enacts that wagers shall be null and void, but further, that no suit shall be brought or maintained for the recovery of money won on a wager. The latter branch of the clause, it was contended, would have no operation if the enactment were restricted to future wagers; for it would be useless to enact that no action should be brought, and still more so that no action should be *maintained*, in respect of a contract already declared to be null and void; and particularly the enactment, that no action should be *maintained*, must, it was said, apply not only to wagers already won, but even to suits already pending for their recovery.

It must be observed that this latter part of the enactment—that, I mean, which prohibits the bringing or maintaining of actions—is in no respect *inconsistent* with the construction which gives to the enactment an operation merely prospective. The most that can be contended is, that the words in question are unnecessary; and therefore, independent of authority, if the argument rested here, what we should have to decide would be, whether the improbability that the legislature should unnecessarily prohibit the bringing or maintaining an action on a contract already made void in a prior part of the same clause, is so great as

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to warrant us in saying that it must have been intended retrospectively to affect rights already vested. I think this would be a very unreasonable and strained inference, and which, considering the ordinary frame and language of acts of Parliament, would be by no means fairly deducible from the clause in question. But the argument of the defendant did not rest on general reasoning only; he relied on some authorities, in which he contended that the Courts had, notwithstanding the general rule as to the prospective nature of new enactments, held them to apply to past transactions as well as future. The first of these authorities was *Towler v. Chatterton* (a). That was an action of indebitatus assumpsit, to which there was a plea of the Statute of Limitations. The plaintiff proved a verbal promise to pay, made by the defendant in February 1828. The action was commenced in January 1829, and was tried in the spring of that year; and the question was, whether the verbal promise, in February 1828, was sufficient to take the case out of the statute, Lord Tenterden's Act (9 Geo. 4, c. 14) having received the royal assent on the 9th of May, 1828. By the first section of that statute it was enacted, that, in actions of debt or upon the case grounded on any simple contract, no promise by words only should be sufficient to take any case out of the operation of the Statute of Limitations, unless the same should be contained in some writing to be signed by the party. The 10th section enacted that the act should commence and take effect on the 1st of January, 1829. At the trial, before *Best*, C. J., the plaintiff was nonsuited, on the ground, that the verbal promise, made in February 1828, was of no avail, for that Lord Tenterden's Act applied to past, as well as future, transactions; and this ruling of the Chief Justice was afterwards supported by the Court of Common Pleas. On referring to the judgment of the three learned judges by

(a) 6 Bing. 258.

whom that case was decided, it would seem that it was founded mainly on the 10th section, which enacted that the act should commence and take effect from the 1st of January, 1829; and from this they inferred that, when that day arrived, the act was in full operation as to all contracts, past as well as future. Parties, they observed, in possession of parol promises, had seven months and upwards, namely, from May 1828, to January 1829, during which to bring their actions; and the inference they seem to draw was, that there would, therefore, be no injustice in giving to the statute, at the end of that time, a full operation, retrospective as well as prospective; and this, they considered, made the case of *Gilmore v. Shuter*, to which I shall presently refer, inapplicable as an authority, inasmuch as in that case there was no clause similar to the 10th section in Lord Tenterden's Act. Now, if the meaning of this 10th section be, as the judges of the Court of Common Pleas, in the earlier part of their judgment, would seem to have supposed, namely, that it was meant to exclude from the operation of the statute all actions brought before the 1st of January, 1829, then the statute would work no real injustice to any one;—a salutary change was to be made in the law, and reasonable time, or what was supposed a reasonable time, was given to all parties affected by the change to protect themselves from any ill consequence in respect of vested rights. But the Court of Common Pleas, in support of their judgment, refer to two *Nisi Prius* cases, one before Mr. Baron *Hullock*, and the other before Lord *Tenterden*, in which those learned judges held the statute to apply to the case of actions brought before the 1st of January, 1829, but in which the trials did not occur till after that date, on the ground, apparently, that the judge at *Nisi Prius* was to treat the statute as being in force at the time of the trial, and as conclusively binding him with respect to what evidence he was to receive. If this narrow construction is to be put on the statute, it is obvious that

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the 10th section must, in many cases, be a mere illusory protection, and would very often afford no protection at all. It might, perhaps, fairly be assumed that every creditor could commence his action before the 1st of January, 1829; it would be contrary to truth to assume it as certain, or, in many cases, even as probable, that he could, before that day, bring his cause to trial. Lapse of years has made it impossible that this question should ever again arise on Lord Tenterden's Act; and it may, perhaps, therefore seem to be an idle thing to discuss the doctrine involved in the cases to which we have referred. But the principle is one of general application, and may apply to future statutes, as indeed it does to that now before us; and I therefore feel bound to say that I cannot think those *Nisi Prius* cases rightly decided. Whether the decision in *Towler v. Chatterton* was correct, would depend on whether the true meaning of the 10th section was to fix a date before which all actions must be *brought*, or a date beyond which no parol promise should be sufficient to take a case out of the operation of the Statute of Limitations. The Court of Common Pleas adopted the former construction. Neither construction would do injustice by infringing the rule which in general makes all statutes prospective in their operation, and the Court of Common Pleas may have been right in their view of the statute; at all events, it is immaterial, in the present case, to discuss that point. It is, however, worthy of remark, that Lord Tenterden's Act points to a writing *to be signed by the parties*—that is, to future acts only; and consequently, the decision, giving to that section a retrospective operation, was not a just one, even in conformity with the most narrow construction of its language.

The only other authority referred to by the defendant, besides that of *Towler v. Chatterton* and the *Nisi Prius* decisions there cited, was a case of *Edmonds v. Lawley*, in this court, reported in 6 M. & W. 285. The case there turned on the construction to be put on the 2 & 3 Vict.

c. 29, which enacts, among other things, that all executions executed before the issuing of a fiat should be valid, notwithstanding any prior act of bankruptcy, provided the execution creditor had no notice of any such prior act of bankruptcy. The defendant, who was sheriff of Warwickshire, had seized the goods of a debtor under a fi. fa., and a fiat afterwards issued against the debtor, on an act of bankruptcy committed before the seizure, but of which the creditor had no notice; the seizure there took place before, but the fiat did not issue till after, the passing of the statute 2 & 3 Vict. c. 29. This Court held that the statute protected the execution against the subsequent fiat. But there it will be observed that no vested right was defeated—the right of the execution creditor was complete, unless a fiat should afterwards issue: the object of the statute was to prevent the retrospective operation of a fiat in all cases where the creditor had had no notice; and we considered the prohibition to apply to every fiat to be issued after the passing of the act. This we considered as an operation merely prospective, interfering with no vested rights. The statute merely provided that future fiats should not, by means of the doctrine of relation, have the effect of disturbing prior vested rights. And, in a subsequent case of *Moore v. Phillips* (a), we held that the statute did not apply to a case where the fiat had issued and assignees had been appointed before the passing of the act; for this, though the language of the statute might have warranted such a construction, would have been an interference with the vested rights of the assignees, and could not, therefore, be assumed to have been intended by the legislature.

It remains only to show that the doctrine propounded by Lord *Coke* does not rest merely on his authority, or on its obvious consonance with natural justice, but has been recognised and acted on in some important and well-considered

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cases, very analogous to that now before us. In *Gilmore v. Shuter*, to which I have already alluded, reported in several books, amongst others in T. Jones, 108, 2 Mod. 310, and 2 Show. 16, the action was brought on a marriage contract, made by parol, without writing, before the 24th of June, 1677; and the question was, whether it could be enforced after the passing of the Statute of Frauds. The language of that statute is very strong. The object of the statute, which became law in April, 1677, is declared, in the preamble, to be "for the prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury;" and it enacts, among other things, that, after the 24th of June, 1677, "no action shall be brought on any agreement, made in consideration of marriage, unless the agreement on which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." The Court held that, however general the language of the statute, it could not have been intended to affect past promises, valid when the act came into operation; and that it must, therefore, be construed as referring to future contracts only; and, according to all the reports of the case, the Court seems to have decided solely on the ground that it would be a flagrant violation of natural justice to make the enactment applicable to existing contracts—even in the case of a statute declared to be necessary for the prevention of fraudulent practices commonly endeavoured to be upheld by perjury. In conformity with this decision, it is stated, in some of the reports of the case, that the judges had said that an unattested will, made before the passing of the act, would be good, even though the testator should not die till after it had come into operation. This case seems to me to go much further than that now under consideration.

On the same principle the Courts acted in cases under

the Mortmain Act, 9 Geo. 2, c. 36. That statute enacted that, after the 24th of June, 1736, no lands should be given or settled to charitable uses, except by deed indented and inrolled in manner therein mentioned. Soon after the passing of the act, a question arose whether it affected wills made before the act, where the testator died after it had come into operation; and, on a reference to the judges, they all held that it did not, and Lord *Hardwicke* acted on their certificate: *Ashburnham v. Bradshaw* (a).

These cases seem to me abundantly to confirm the accuracy of the doctrine as laid down by Lord *Coke*. I do not mean, of course, to say that an enactment may not be so made as to have a retrospective operation. In some cases the legislature has thought it just to make enactments retrospective, even at some sacrifice of general principle. But then it does so in express terms; and generally, I believe invariably, couples the retrospective enactment with the best indemnity in favour of vested rights which the nature of the case admits. This very statute (sect. 16) illustrates what I mean. By previous statutes, persons guilty of certain offences connected with wagering had been subjected to pecuniary penalties, to be recovered by common informers. The statutes imposing those penalties are repealed by the statute now under consideration; and the legislature, deeming it improper that any future penalties should be recovered under the repealed laws, enables any party sued for penalties to obtain an order of the Court or a judge for discontinuing the action; but this is to be done only on payment of the costs incurred prior to the 5th of March, 1844. Why that day was fixed on, does not appear on the face of the statute; but it probably was the day when the subject was first introduced into Parliament, and when, therefore, notice may be considered as having been given to every one that he would institute any action at his peril. The same course

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was adopted by the 54 Geo. 3, c. 54, ss. 6, 7, in respect to actions for penalties under the Clergy Residence Act, and by the 2 Vict. c. 12, s. 5, in actions under the Printers' Act; and no doubt there are other similar cases. The absence of any such provision in this act, as to rights existing when the act became law, seems to me strongly confirmatory of the view I have taken; and, for the reasons I have already stated, I think that the statute 8 & 9 Vict. c. 109, s. 18, was not meant to affect rights already acquired under wagers made before the passing of the act; and so that the plaintiff is entitled to our judgment.

ALDERSON, B.—I think also that the plaintiff is entitled to our judgment in this case. In construing statutes, the general rule, as it seems to me, which ought to guide us in their construction, is that which has been stated. They are not to be supposed to apply to a past, but to a future, state of circumstances. Various instances might be adduced to shew what extensive consequences might follow if we did not abide by these general principles. For instance, to take one only:—The 3 & 4 Vict. c. 113, s. 42, enacts, "That it shall not be lawful for any spiritual person to sell or assign any patronage or presentation belonging to him, by virtue of any dignity or spiritual office held by him; and that every such sale or assignment shall be null and void to all intents and purposes." Now the words "every such sale or assignment shall be null and void to all intents and purposes," might literally apply to the options granted, *before the act*, to the Archbishop of Canterbury, by the respective bishops, on their consecration,—a species of property which hitherto has gone, according to the Archbishop's will, to his executors^(a). Could it be supposed that the legislature intended this without express words? Even the application of this section to future options, which

(a) See 1 Burn's Eccles. Law, 239.

no doubt was the effect of the clause, was, probably, beyond their view. But, in truth, the latter words of the clause are redundant only, not retrospective. Here, no doubt, the legislature were desirous of putting an end to gaming and wagers; but, unless the words imperatively require it, we ought not to make their prohibition retrospective; for it is contrary to the first principles of justice to punish those who have offended against no law; and surely to take away existing rights without compensation, is in the nature of punishment. The words of the statute do not, as it seems to me, require this construction. The first clause of the section is probably prospective. All contracts, by way of gaming or wagering, are made void. It seems to me, at present, that this applies to the future; and indeed it was, as I understood, so admitted by Mr. *Lush* in his argument. But it was said that the next clause was not so; for that it not merely prohibited the future bringing of suits to enforce wagers, but also the future maintenance of such suits when previously brought. But I cannot give such a construction to what appear to me only redundant words in this section. If it had been stated "that no action shall be brought," or only "that no action shall be maintained," it seems to me clear that we should have considered the words "brought" and "maintained" as synonymous, and as prohibiting the success of future suits alone. And although the use of both in one sentence makes this less obvious, yet, when we consider that to give the more strict interpretation to the word "maintained" will compel us to suppose, without further evidence, that the legislature contemplated so gross an act of injustice as, without compensation, to take away an existing right of action already pending, and that, too, with no provision even for the costs incurred in the enforcing of what was, before the act, a legal right, I am not disposed to put such a construction on the word, but to treat it, as I think the legislature intended it, as a redundant expression only.

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In the 16th section, where they do speak of existing actions of another sort, they do provide for the staying them, by application to the Court and on payment of costs; and I think, if they had intended to put an end to pending actions of this description, they would have shewn it by introducing a similar provision in the 18th section.

It is not necessary to determine whether, by the first part of the 18th section, the legislature may not have intended to put at once an end to the legal obligation both of existing and future contracts, leaving the parties to all such wagers to act thereafter on them as honourable engagements alone. If any suit shall be hereafter instituted upon any such previous contract, that question may, perhaps, be open to further argument. But in this case, where the contract existed and the suit was instituted before the act, it seems to me that the act does not affect it. I think, therefore, that the plaintiff is entitled to judgment.

PARKE, B.—The only question in this case is, whether the act (8 & 9 Vict. c. 109, s. 18) affects existing suits for the recovery of wagers or not. The clause in question having been read, it is unnecessary for me to repeat it.

I have felt a good deal of difficulty in deciding upon the true construction of this clause; but, after much consideration, I agree in opinion with my Brothers *Alderson* and *Rolfe*, that it applies to future actions only.

The language of the clause, if taken in its ordinary sense, as in the first instance we ought to do, applies to all contracts, both past and future, and to all actions, both present and future, on any wager, whether past or future. But it is, as Lord *Coke* says, “a rule and law of Parliament that regularly, nova constitutio futuris formam imponere debet, non præteritis(a).” This rule, which is in effect, that enactments in a statute are generally to be construed to be pro-

(a) 2 Inst. 292.

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it is not a matter of surprise, that the legislature took an early opportunity of putting a stop to them; and also it is to be borne in mind, that the parties who would suffer by a strict construction of the clause, are often successful gamblers or speculators, not much the objects of favour with the legislature; and one considers the clause, therefore, not quite in the same spirit, as if the enactment related to ordinary contracts.

The enactment, "that all contracts or agreements, by way of gaming or wagering, shall be null and void," if it stood by itself, ought most clearly to be construed as applicable to future contracts and agreements only, by virtue of the rule of construction to which I have adverted, and the apparent injustice of putting an end to a vested right. So, if the next part stood alone, it would, I think, though not so clearly, be construed, for the same reason, to apply to future actions only; and the clause, to avoid the injustice which would otherwise be inflicted on a plaintiff, should be construed to mean, not that an action already brought should not be maintained, but that no action should afterwards be brought, or, if brought, maintained; and the absence of any provision that the costs of an existing action should be paid by a defendant, in my mind, strongly favours that construction. The union of the two clauses together does not appear to me to make any difference. The latter clause is surplusage, so far as it relates to bringing actions, whether we construe the former to apply to future or existing contracts; and the only observation that can be made is, that in one mode of construing the enactment the word "maintained" is inoperative, in the other it is not. It is redundant, unless it applies to the maintenance of an existing action; but this circumstance of mere redundancy does not appear to me to be sufficient to shew, that the legislature meant to do so unjust a thing as to prevent the maintenance of an existing well-founded action. I think it best to abide by the sound rule of construction above referred to, notwithstanding the con-

jectures as to the real intention of the legislature, which the nature of the subject occasions. I therefore hold that, at all events, this action is maintainable, and am disposed to say that the clause affects none but future wagers; and, consequently, that the plaintiff is entitled to our judgment.

Judgment for the plaintiff.

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ASSUMPSIT.—The declaration stated, that the defendant, at the time of the making of the agreement thereafter next mentioned, was lawfully possessed, for the then residue of a certain term of years, to wit, a term of fourteen years computed from the 12th day of May, 1846, of a certain messuage and premises, called &c., with the appurtenances; that the defendant was so then possessed as aforesaid, under and by virtue of a certain indenture of lease, bearing date the 12th day of May, 1846, made between J. P. of the one part, and the defendant of the other part; by which indenture the said messuage and premises, with the appurtenances, were, for the consideration therein mentioned, leased, &c., unto the defendant, for the said term of fourteen years, at the yearly rent of £37, payable quarterly: that in the said lease there were and are contained covenants, on the part of the defendant, for himself, his executors, &c., to pay the rent &c.: that the defendant, at the time of the making of the said agreement, represented to the plaintiff that he the defendant was, and the plaintiff

A declaration, after reciting that defendant was possessed, for the residue of a term of years, of a certain messuage and premises, and also of certain fixtures annexed to the premises, averred that plaintiff agreed with defendant to purchase of him the residue of the term of the said messuage and premises, with the appurtenances and the said fixtures, and defendant, amongst other things, agreed to give up possession of the messuage, with the appurtenances and the

said fixtures, on a certain day. The declaration then averred that plaintiff tendered to defendant, for execution, an instrument which, amongst other things, contained a recital that plaintiff had lately contracted with defendant for the sale to him of the residue of the term granted to him by one J. P., in the messuage or tenements and hereditaments, &c., with their appurtenances, and also *all and singular* the fixtures belonging to the said messuage or tenements and hereditaments, for a certain sum, the receipt of which was thereby acknowledged:—*Held*, on motion in arrest of judgment, that, as the agreement between the parties was for the assignment of the fixtures only, which belonged to defendant, the recital in the instrument tendered was too large, and therefore that it was not such a one as defendant was bound to execute; and the judgment was arrested.

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avens that he the defendant in fact then was, lawfully possessed of certain fixtures then annexed to the said messuage and premises, and then also was lawfully entitled to disannex and remove the same fixtures from the said messuage and premises, and convert and dispose thereof to his, the defendant's, own use, but did not represent to the plaintiff what the said fixtures were, nor did, nor does the plaintiff know what they were: that thereupon theretofore, to wit, on the 16th February, 1847, by a certain agreement then made by and between the plaintiff and defendant, of and concerning the said messuage and premises, with the appurtenances, and of and concerning the said residue of the said term, and of and concerning the said fixtures, and of and concerning the plaintiff, and of and concerning the defendant, it was agreed by and between the plaintiff and defendant as follows, that is to say:—“Memorandum: Mr. Bailey, (meaning the defendant), of 23, East-place, &c., (meaning the said messuage and premises), has this day agreed to sell, and J. Manning (meaning the plaintiff) has agreed to purchase, the unexpired term or lease (meaning the said residue of the said term) of the house No. 23, (meaning the said messuage and premises), with the appurtenances, as above, and also the fixtures, &c. (meaning the said fixtures) belonging to the said C. Bailey, (meaning the defendant), to pay the rent, and all rates and taxes, due to the 25th of March next; and do also agree (meaning the defendant agreed) to give up possession of the said house and premises, (meaning the said messuage and premises), with the appurtenances and fixtures, (meaning the said fixtures), on or before the 12th of March next. The said J. Manning (meaning the plaintiff) has this day paid the sum of £10 as a deposit, and agrees to pay the remainder on taking possession of the said premises (meaning &c.) and the said fixtures (meaning &c.) Witness our hands” &c.—The declaration then contained an averment, that the plaintiff paid the £10 to the defendant, &c.; it also contained an aver-

ment of mutual promises; and then proceeded to state, that although the said 12th day of March, 1847, had expired before the commencement of the suit, and although the plaintiff, on that day, was ready and willing and offered to the defendant to purchase the said residue of the said term and the said fixtures of and from the defendant, at the price of £40, according to the terms of the said agreement, and to accept possession of the said messuage and premises, with the appurtenances and fixtures, and to pay the defendant the sum of £30, being the difference between the said sum of £10, so paid as aforesaid, and the said sum of £40, and then tendered to him, the defendant, to execute a certain parchment writing sufficient, when signed and sealed by the defendant, and delivered by the defendant as his act and deed, to assign to the plaintiff the residue of the said term, which said writing then was in the words, letters, and figures following, that is to say, "This indenture, made the 12th day of March, 1847, between Charles Bailey, of &c., of the one part, and Joseph Manning, of &c., of the other part, which, after reciting that by a certain indenture made by and between Charles Bailey and one J. P., all that the messuage or tenements and hereditaments therein and hereinafter particularly described, with the appurtenances, were, for the considerations therein mentioned, demised, leased, set, and to farm let unto the said Charles Bailey, for the term of fourteen years thence next ensuing, and fully to be complete and ended, on payment yearly and every year, during the said term thereby demised, unto the said J. P., his executors, administrators, or assigns, of the rent or sum of £37 of lawful money, free and clear of and from the land-tax, and all other taxes, rates, charges, assessments, and deductions whatsoever, the said rent to be payable quarterly, namely, on &c.; and in the said lease are contained covenants, on the part of the said Charles Bailey, for himself, &c., for the payment of the rent, land-tax, &c. And also that the said Joseph Manning has lately contracted with the said Charles Bailey

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for the sale to him of the residue of the said term of fourteen years, so granted to the said Charles Bailey by the said J. P., in the said messuage or tenements and hereditaments therein and hereinafter described and assigned, or intended so to be, with their appurtenances, and also *all and singular* the fixtures belonging to the said messuage or tenement and hereditaments, at or for the price or sum of £40: Now this indenture witnesseth, that, in pursuance of the said agreement, and in consideration of the sum of £40, of lawful British money, to him the said Charles Bailey in hand well and truly paid by the said Joseph Manning, at or immediately before the sealing and delivering of these presents, the receipt whereof, and that the same is in full for the purchase of the residue now to come and unexpired of the said term of fourteen years in the said messuage or tenements and hereditaments hereinafter described, and hereby assigned, or intended so to be, he the said Charles Bailey doth hereby confess and acknowledge, and of and from the same and every part thereof doth fully and absolutely acquit, release, and discharge the said Joseph Manning, his executors, &c., he, the said Charles Bailey, hath assigned, transferred, and set over, and by these presents doth assign, transfer, and set over, unto the said Joseph Manning, his executors, &c., all that messuage or tenement, being, &c., and their appurtenances; and also all and singular the fixtures belonging to the said messuage or tenement, &c., and hereditaments hereinbefore described and intended to be hereby assigned, and also the hereinbefore recited indenture of lease of the 12th day of May, 1846: To have and to hold the said messuage or tenement, and all and singular the said premises hereby assigned or intended so to be, with their appurtenances, unto the said Joseph Manning, his executors, &c., for and during all the residue and remainder now to come and unexpired of and in the term of fourteen years, so granted by the said hereinbefore recited indenture of lease of the 12th of May, 1846," &c. (The instrument contained several covenants

which are not material to the present question). The declaration then stated, that the plaintiff did then request the defendant to accept the said sum of £30 so tendered, and to execute the last-mentioned writing, to wit, by signing the same, and sealing the same, and delivering the same as his, the defendant's, act and deed, and to give up possession to the plaintiff of the said messuage and premises, with the appurtenances and fixtures, yet the defendant disregarded his said promise, and did not nor would, on or before the said 12th day of March, or at any other time, give the plaintiff possession of the said messuage and premises, and fixtures, or any or either of them, or sell or assign to the said plaintiff the said residue of the said term, &c. To this declaration the defendant pleaded several traverses, upon each of which issue was joined.

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At the trial, before *Parke, B.*, at the Middlesex Sittings in Trinity Term last, the plaintiff had a verdict, with £30 damages.

Montagu Chambers, in the same term, obtained a rule calling on the plaintiff to shew cause why the judgment should not be arrested.

Watson now shewed cause.—The objection which has been raised to this declaration is, that, inasmuch as the defendant agreed to sell his own fixtures only, he was not bound to execute the instrument tendered to him for execution, as it would have passed all the fixtures, whether belonging to him or not. The defendant was called upon to assign the term merely, and the fixtures for the term. This habendum would pass the term and the fixtures belonging to the buildings. All that the plaintiff required was a sufficient assignment of the term.—He referred to *Colegrave v. Dias Santos (a)*.

Chambers, in support of the rule.—The judgment ought

(a) 2 B. & C. 76.

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to be arrested. The recital is incorrect. It distinctly states an agreement to assign the defendant's term in the premises, and also a sale of *all* the fixtures, not only the fixtures to which the defendant was entitled; so that by this deed, if it had been executed, not only landlords' or tenants' fixtures, but the fixtures belonging to a previous tenant, would pass. The defendant has only agreed to transfer his own. The habendum excludes the fixtures, and only goes to the term.

PARKE, B.—I am of opinion that this rule ought to be made absolute. In the case of *Vonhollen v. Knowles* (a), where there was an agreement that the plaintiff should purchase of the defendant a certain house and shop-fixtures for £150, whereof £125 was to be paid upon taking possession, and the remainder by bills at certain dates, and that the defendant should grant, and the plaintiff should take, a lease of the messuage for twenty-one years, at the rent of £60, the plaintiff tendered an instrument to the defendant for his execution, which stated that, as well in consideration of the sum of £150 paid by the plaintiff to the defendant, as also of the yearly rent, covenants, &c., the defendant had demised and leased all that messuage, &c.: and this Court held that it was not such an instrument as the defendant had bound himself by his agreement to execute. My Brother *Alderson* there said, "Although the objection taken by the defendant is one that deserves but little favour, it seems to me that it must necessarily prevail. The plaintiff being bound to tender a lease in conformity with a certain agreement, has tendered one, which states that the sum of £150, which by the agreement was to be paid for fixtures, was to be paid as a consideration for the lease itself. Now, supposing this recital not to operate as an estoppel upon the defendant, in case

(a) 12 M. & W. 602.

an action was brought against him by the present plaintiff, still it would place him in a different situation from that in which he now stands, as it would afford *primâ facie* evidence against him, which he would have to rebut by means of witnesses, or by the production of the agreement; the lease would therefore be evidence against him, although, perhaps, not conclusive." Now here, this recital, which states that the defendant had lately contracted with the plaintiff for the sale to him of all and singular the fixtures belonging to the said messuage or tenement and hereditaments for the price of £40, and the receipt of that sum, is not correct. If the defendant had executed this instrument, it would have been strong evidence against him. As this is upon the record, we can say that it is not such an instrument as the defendant was, in conformity with his agreement, bound to execute. It is certainly an unfortunate recital; but if the defendant had executed the lease, he would have placed himself in a worse situation than that in which he is at present.

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ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Rule absolute.

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JONES v. HARRISON.

In an action by an allottee of a railway company for the recovery of his deposit, (the project having been abandoned), it appeared that the shares had been allotted to him upon the terms of the following letter of allotment:—"The directors assume the right to carry out their intentions by the adoption of all such measures as they may deem requisite for obtaining the necessary parliamentary powers to form a company for the construction of the entire railway, or any part of it, with such branches, extensions, or alterations as they may find expedient, and to apply the amount paid for deposits in discharge of any liabilities incurred by them under the general powers vested in them for the prosecution of the undertaking. A sub-

scribers' agreement and parliamentary contract, in such form and with such provisions as the committee may think necessary, will be prepared and lie at the company's offices for signature, from, &c., both inclusive:"—*Held*, that, upon the true construction of this letter of allotment, the directors had authority to lay out the deposits in such necessary expenses as had been incurred by them in the prosecution of the scheme, and, all the deposits having been so expended, that the plaintiff was not entitled to recover.

ASSUMPSIT for money had and received, for money paid, and on an account stated. Plea, non assumpsit.

At the trial, before *Maule, J.*, at the last Denbighshire Summer Assizes, it appeared that the action was brought to recover 31*l.* 10*s.*, being the amount of deposit paid by the plaintiff, in November, 1845, on fifteen shares in a projected railway company, called "The Wrexham, Nantwich, and Crewe Junction Railway Company," of which the defendant was one of the managing directors. The scheme was set on foot in the autumn of 1845, and prospectuses were issued, which announced the company to be provisionally registered, and that the capital was to be £450,000, to consist of 22,500 shares of £20 each; deposit, 2*l.* 2*s.* 6*d.* per share. On the 6th of October, the plaintiff sent the following letter of application for shares:—

"To the Provisional Committee of the Wrexham, Nantwich, and Crewe Junction Railway.

"Gentlemen,—I request you to allot me 100 shares, of £20 each, in the above undertaking; and I hereby engage to accept the same or any less number which may be allotted to me, and to pay the deposit thereon, and to execute the parliamentary contract and subscribers' agreement when required."

In answer to this application, the plaintiff received the following letter of allotment, dated the 25th of October:—

“ Wrexham, Nantwich, and Crewe Junction Railway.
(Provisionally registered).

“ Capital £450,000, in 22,500 shares of £20 each.

Deposit, 2*l.* 2*s.* 6*d.* per share.

Allotment, No. 64.

Deposit, 31*l.* 17*s.* 6*d.*

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“ Sir,—I am directed to inform you, that the committee of management have, in compliance with your application, allotted to you fifteen shares in this company, on the terms and conditions annexed; and you are therefore required to pay the deposit of 2*l.* 2*s.* 6*d.* per share, amounting to 31*l.* 17*s.* 6*d.*, to one of the under-mentioned bankers, on or before the 1st of November next. In default of such payment being duly made, this allotment will be then cancelled, and the shares appropriated to other applicants.

“ I am, &c.,

“ Secretary.”

(Here followed a list of bankers.)

“ On payment of the deposit to the bankers, this letter will be exchanged for a receipt. Terms and conditions on which the shares in the company are allotted :—The company is formed for the purpose of constructing a railway from Wrexham to Crewe, (by such route, and with such extensions, as the directors may think necessary on the engineer’s report). The directors assume the right to carry out their intentions by the adoption of all such measures as they may deem requisite for obtaining the necessary parliamentary powers to form a company, for the construction of the entire railway, or any part of it, with such branches, extensions, or alterations as they may find expedient, *and to apply the amount paid for deposits in discharge of any liabilities incurred by them under the general powers vested in them for the prosecution of the undertaking.* Powers will be applied for to allow interest, at the rate of £4 per cent. per annum, on the amount of calls paid, until the opening of the line. A subscribers’ agreement, and a parlia-

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mentary contract, in such form and with such provisions as the committee may think necessary, will be prepared and lie at the company's offices for signature, from &c. to &c., both inclusive. Arrangements will also be made and duly announced for the execution of the deeds by shareholders resident in or near the provincial towns in which shareholders may reside. The shares, with the deposits made thereon, will be liable to forfeiture, without notice, in respect of which the subscribers' agreement and parliamentary contract are not signed within the specified time.

" By order, &c.,

" Secretary."

The plaintiff accordingly paid 31*l.* 17*s.* 6*d.* on the 1st of November, 1845, but received back 7*s.* 6*d.*, as it was considered by the directors that more than 2*l.* 2*s.* per share could not be legally received. On the 8th of December, the plaintiff executed the subscribers' agreement, and received three scrip certificates for his shares, which were in the following form:—

" Wrexham, Nantwich, and Crewe Junction Railway.
 Capital £450,000, in 22,500 shares of £20 each, on which a deposit of 2*l.* 2*s.* per share has been paid.

" Scrip certificate, 5 Shares.

No. — to — inclusive.

" The holder of this certificate, having signed the parliamentary contract and subscribers' agreement, and having agreed to pay all future calls, is the proprietor of 5 shares in the capital, for the time being, of the above undertaking."

This was signed by two of the directors. The shares had been all allotted, but deposits had been paid upon between 3000 and 4000 only, although the time for payment had been extended. The scheme had been abandoned. The plaintiff's deposit had been expended in payments for surveys and plans to be deposited with the Board of Trade,

and other preliminary expenses attending the carrying on of the scheme. It was contended for the defendant, that the plaintiff was not entitled to recover his deposit, which had been so expended by the directors, as they had authority to do under the powers reserved by them by the letter of allotment. The learned judge, in summing up, after telling the jury that he thought there was evidence of fraud antecedently to the execution of the subscribers' agreement, but that that fraud, being after the payment of the deposit, would not, in his opinion, of itself give the plaintiff a right to recover, left it to the jury to say whether the scheme had been abandoned before the commencement of the action, and the jury found that it had. His Lordship thereupon directed a verdict to be entered for the plaintiff, reserving leave to the defendant to move to enter a nonsuit, if the Court should be of opinion that the construction of the letter of allotment, for which the defendant contended, was correct.

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Townsend having accordingly obtained a rule to enter a nonsuit,

Martin and *Welsby* now shewed cause.—The subscribers' agreement, which the plaintiff signed, is void; for, at the time he signed it, instead of the deposits upon 22,500 shares having been paid, not more than between 3000 and 4000 had been paid; and as the plaintiff was not made acquainted with this most material fact by the company at that time, upon the ground that a material fact was suppressed, which was equivalent to a fraudulent misrepresentation on the part of the directors, the deed is void: *Wontner v. Shairp* (a); and the deed alone gives the power to pay the expenses out of the deposits. [*Parke*, B.—That point was not made at the trial. The only question before us is as to the true construction of the letter of allotment. It appears, from

(a) 4 C. B. 404.

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the note of the learned judge at the trial, that there was no question raised as to any fraud antecedent to the payment of the deposit; and if there had, it would have been very difficult to maintain such an objection.] The words of the letter of allotment are, that the directors assume the right "to apply the amount paid for deposits in discharge of any liabilities incurred by them under the general powers vested in them, for the prosecution of the undertaking. . . . A subscribers' agreement and a parliamentary contract, in such form and with such provisions as the committee may think necessary, will be prepared," &c. The power surely vests upon a deed to be subsequently executed, and, as that deed was not duly executed, the directors had no power to dispose of the deposits. The directors could have no reason to suppose that the scheme could be effectually carried on. [*Parke, B.*—If that was so, you should have insisted upon that objection at the trial, and not have consented that leave should be reserved to enter a nonsuit upon the construction of the letter of allotment; that is the only question which we have before us at present.]

Townsend and Foulkes, in support of the rule, were not heard.

PARKE, B.—The only question upon which we have now to give our opinion, and which was reserved by the learned judge at the trial, is, whether, upon the true construction of this letter of allotment, the directors of the Company were empowered to apply the deposits for the purposes of such preliminary expenses as might be necessary and reasonable for the prosecution of the undertaking. We are all of opinion that they were so empowered, and consequently this rule must be made absolute. With respect to the subscribers' agreement, which the plaintiff executed, it was contended by his learned counsel to be void, inasmuch as the execution of it was obtained by fraud, and that, upon

the authority of *Wontner v. Shairp*, the circumstances were such as, if left to the jury, would warrant them in finding that the transaction was fraudulent, and therefore that the deed ought to be considered out of the case altogether, and that the whole case rested upon the letter of allotment, which did not give the power contended for. It appears that at the trial the plaintiff's counsel did not ask the learned judge to put the question of fraud, antecedent to the letter of allotment, to the jury, but that he consented to leave for consideration the question of law as to the true construction of the letter of allotment. If the plaintiff's counsel had meant to insist upon the invalidity of the letter of allotment, as well as of the deed, on the ground of fraud, he should have required it to be left to the jury; but, according to the learned judge's note, no objection was raised on that ground; and indeed, if it had, it seems to me that the plaintiff would have had little chance of success. In *Wontner v. Shairp*, there were matters for the consideration of the jury, such as to justify them in finding that the execution of the subscribers' deed had been obtained by fraud, as having been obtained at a time when sufficient money had not been received, by the payment of an adequate number of deposits, to warrant them in proceeding with the undertaking. But, as the question of fraud was for the jury, and as no point was made upon that part of the case, although I do not see how it would have been of any assistance to the plaintiff, that question must be dismissed altogether from the case, and it remains to be considered on the construction of the letter of allotment alone. That letter was issued upon an allotment of shares to the plaintiff, which was contemporaneous with allotments of the remaining shares to other persons. Now, it appears to me that the true construction to be put upon the terms of this letter of allotment is, that the directors of the company intend to say, "We shall apply the money deposited in our hands in the manner we may think fit for the purposes of carrying on the undertaking, and of

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carrying it properly into effect, and in discharge of those liabilities which we may incur in its progress." That appears to me to be the true meaning of the document; the words of which are, that "the directors assume the right to carry out their intentions by the adoption of all such measures as they may deem requisite for obtaining the necessary parliamentary powers to form a company, for the construction of the entire railway, or any part of it, with such branches, extensions, or alterations as they may find expedient, and to apply the amount paid for deposits in discharge of any liabilities incurred by them under the general powers vested in them for the prosecution of the undertaking." The expression "general powers" means, as I take it, the powers already vested in them, and which they then assume for the purpose of carrying the undertaking into effect, and it does not mean such powers as may become vested in the directors at a future period. This being so, they are empowered to apply the deposits for all such purposes: as for advertisements, surveys, and necessary plans to be deposited with the Board of Trade, and all other necessary and reasonable expenses of that description. If it had been contended that the expenses had been unreasonable, the question was one which was proper to be left to the jury. This letter of allotment contains the above provision, which was not in that in the case of *Walstab v. Spottiswoode* (a), and for this reason the cases are distinguishable. If any surplus remained after the payment of such expenses, the directors would, of course, be bound to refund to the plaintiff his due proportion; but, if all the deposits had been expended, the plaintiff would not be entitled to any portion of his deposit. The whole question, as I have before said, turns upon the true construction of the letter of allotment. I am of opinion that, according to the terms of that instrument, the defendant had authority to make the application of the deposits which was made.

(a) 15 M. & W. 501.

ALDERSON, B.—I am of the same opinion. It appears to me that, when the plaintiff paid his money by way of deposit, it was upon the understanding that it should be laid out in a legitimate manner; and as no objection was made as to the manner in which it had been laid out, the plaintiff has no right to succeed in this action.

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ROLFE, B.—I am of the same opinion. I think that the words “general powers” mean “those powers which are *now* vested in us.”

PLATT, B., concurred.

Rule absolute.

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Feb. 11.

DEBT for work and labour, for money paid, and on an account stated. The defendants pleaded, secondly, a set-off for goods sold and delivered, for money lent, money paid, money had and received, and on an account stated.

Replication to the second plea, as to so much of that plea as relates to the said goods therein mentioned, and as relates to the sum of 16*l.* 8*s.*, parcel &c., in the said plea mentioned, being the said price and value of the said goods, and also as relates to the said causes of set-off in respect of the said goods, and the said price and value thereof, that the said sum of 16*l.* 8*s.*, parcel &c., is claimed by the defendants to be due and payable to them from the plaintiff, for the price and value of the said goods in the said plea mentioned, before the commencement of this suit sold and delivered by the defendants to the plaintiff, as in the said plea mentioned. And the plaintiff further says, that, before and at the time of the accruing of the said supposed causes of set-off, in the said plea mentioned, so far as the said

A person who takes a contract to execute a certain cutting on a railway, at a certain sum per cubic yard, and employs several men under him to assist in doing the work, is not a *workman* or *labourer* within the true meaning of the 1 & 2 Will. 4, c. 37, (the Truck Act), although he does a portion of the work himself.

Where the earth removed is clay, which is used for making bricks, *Quære*, whether a labourer engaged in the removal of such earth is a person “em-

ployed in or about the working or getting of clay,” within the meaning of the 19th section of the act.

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plea relates to the said goods and the said sum of 16*l.* 8*s.*, parcel &c., being the said price and value thereof, and before and at the time of the sale and delivery by the defendants to the plaintiff of the said goods in the said plea mentioned, as therein mentioned, and as hereinafter mentioned, for the price and value of which the said sum of 16*l.* 8*s.*, parcel &c., was and is so as aforesaid claimed by the defendants to be due to them from the plaintiff as aforesaid, to wit, on &c., and from thence until, to wit, &c., the plaintiff was a workman and labourer, engaged and employed by the defendants in a certain occupation, to wit, in the occupation of and in and about the getting of clay, within the true intent and meaning of a certain act of Parliament made and passed in the session of Parliament holden in the first and second years of the reign of his late Majesty King William the Fourth, intituled "An Act to prohibit the Payment in certain Trades of Wages in Goods, or otherwise than in the Current Coin of the Realm." And the defendants, before and at the time and during the time of the said alleged sale and delivery of the said goods in the said plea mentioned, and of the accruing of the said causes of set-off in respect of the said sale and delivery, to wit, the said sum of 16*l.* 8*s.*, parcel &c., to wit, during all the time aforesaid, were brickmakers and manufacturers of bricks, and the trade of brickmakers and manufacturers of bricks carried on, exercised, and followed, and still do carry on, exercise, and follow, within the meaning of the said statute; and the plaintiff further says, that heretofore and after the passing of the said act of Parliament, and before and at and during the time of the said sale and delivery of the said goods in the said plea mentioned, the price and value of which, to wit, the said sum of 16*l.* 8*s.*, parcel &c., is claimed to be due and payable by the plaintiff to the defendants as aforesaid, and during all the time aforesaid, to wit, on &c., and thence until and upon, to wit, &c., he, the plaintiff, was in the employ of the defendants as a workman and labourer, in the said occupation of and in and

about the getting of clay, such clay being intended to be used and applied by the defendants for the purpose of making and preparing therewith of bricks, and the plaintiff was during the time last aforesaid engaged and employed by the defendants in the said occupation of and in and about the getting of clay, such clay being intended to be used and applied by the defendants for the purpose aforesaid; and the defendants, during the time last aforesaid, employed and were the employers of the plaintiff in the said occupation of and in and about the getting of clay, such clay being intended to be used and applied by the defendants as aforesaid. And the plaintiff further says, that this action was brought and commenced after the passing of the said act of Parliament, and was so brought and commenced by the plaintiff, as such workman and labourer as aforesaid, against the defendants, his employers as aforesaid, for the recovery of divers sums of money due to the plaintiff as such workman and labourer as aforesaid, as the wages of his labour in the said occupation hereinbefore mentioned. And the plaintiff further says, that the said goods in the said plea mentioned, for the price and value of which the said sum of 16*l.* 8*s.*, parcel &c., is claimed to be due and payable by the plaintiff to the defendants, and for and in respect of which price and value the defendants have pleaded the said set-off, were and are certain goods which the defendants sold to the plaintiff, and delivered and supplied to him, and which the plaintiff had and received, on several days and times during and whilst the plaintiff was in the employment of the defendants as such workman and labourer, and engaged and employed by the defendants as such workman and labourer, in the said occupation of and in and about the getting of clay intended to be used and applied as aforesaid, and whilst the defendants so employed and were the employers of the plaintiff in the said occupation of and in and about the getting of clay in-

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tended to be used and applied for the purposes aforesaid by the defendants, to wit, on &c., and on divers other days and times between that day and the said &c., and before the commencement of this suit; and the plaintiff says, that the said goods were so sold to the plaintiff as aforesaid, and delivered and supplied to the plaintiff, and by him had and received, as for and on account of his wages, and in reward for his labour as such workman and labourer as aforesaid, of and in and about the getting of clay, as aforesaid, by him done and performed whilst in the employ of the defendants as aforesaid, and not otherwise, contrary to the form and effect of the said statute in such case made and provided. Verification.

Rejoinder, that the plaintiff was not, at the time of the sale and delivery by the defendants to the plaintiff of the said goods in the said second plea mentioned, or of any of them, or of any part thereof, a workman or labourer engaged or employed by the defendants, or either of them, in the said occupation of, in, or about the getting of clay, modo et formâ, concluding to the country; upon which rejoinder issue was joined.

At the trial of the cause, before *Coleridge, J.*, at the last Summer Assizes at Gloucester, it appeared that the plaintiff had done the work, which was the subject of the action, as a sub-contractor under the defendants, who had contracted to make a certain portion of the Oxford, Worcester, and Wolverhampton Railway. The defendants had divided the contract they had taken into several smaller portions, one of which the plaintiff had taken from them, at a certain sum per cubic yard. The plaintiff engaged eight or nine men to work with him. Tickets for goods were supplied by the defendants to the plaintiff, who gave them to his men as payment. There was evidence to shew that the clay which was obtained from the cuttings was applied to the purpose of making bricks. *Coleridge, J.*, told the jury,

that, if the object was to save the clay for the purpose of making bricks, he was of opinion that that part of the case would be within the act; but he was also of opinion, that the plaintiff was not a labourer or workman within the act, which he thought did not apply as between contractor and sub-contractor, and that the mere fact of the plaintiff joining in the work did not make any difference. He therefore directed the jury to find a verdict for the defendants on the plea of set-off, with leave reserved to the plaintiff to move to enter a verdict for 16*l*. 8*s*.

Accordingly, in Michaelmas Term last, *Greaves* having obtained a rule,

W. H. Cooke now shewed cause.—The substantial question is, whether the defendants are entitled to the benefit of their set-off, or whether they are deprived of it by virtue of this act, 1 & 2 Will. 4, c. 37 (*a*). Under the circum-

(*a*) Sect. 1, after reciting that "it is necessary to prohibit payment in certain trades, of wages in goods, or otherwise than in the current coin of the realm," enacts, "that in all contracts hereafter to be made, for the hiring of any artificer in any of the trades hereinafter enumerated, or for the performance by any artificer of any labour in any of the said trades, the wages of such artificer shall be made payable in the current coin of this realm only, and not otherwise; and that, if in any such contract the whole or any part of such wages shall be made payable in any manner other than in the current coin aforesaid, such contract shall be and is hereby declared illegal, null, and void."

Sect. 3 enacts, that "the entire amount of the wages earned by or

payable to any artificer in any of the trades hereinafter enumerated, in respect of any labour by him done in any such trade, shall be actually paid to such artificer in the current coin of this realm, and not otherwise; and every payment, made to any such artificer by his employer, of or in respect of any such wages, by the delivering to him of goods, or otherwise than in the current coin aforesaid, except as hereinafter mentioned, shall be and is hereby declared illegal, null, and void."

By sect. 4, artificers may recover wages if not paid in the current coin.

Sect. 5 enacts, that, "in any action, suit, or other proceeding to be hereafter brought or commenced by any such artificer as aforesaid, against his employer for

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stances of the present case, the plaintiff is clearly not a workman or labourer within the true meaning of that act.

the recovery of any sum of money due to any such artificer as the wages of his labour, in any of the trades hereinafter enumerated, the defendant shall not be allowed to make any set-off, nor to claim any reduction of the plaintiff's demand by reason or in respect of any goods, wares, or merchandise had or received by the plaintiff as or on account of his wages or in reward for his labour, or by reason or in respect of any goods, wares, or merchandise, sold, delivered, or supplied to such artificer, at any shop or warehouse kept by or belonging to such employer, or in the profits of which such employer shall have any share or interest."

Sect. 19 enacts, "that nothing herein contained shall extend to any artificer, workman, or labourer, or any person engaged or employed in any manufacture, trade, or occupation, excepting only artificers, workmen, labourers, and other persons employed in the several manufactures, trades, and occupations following; (that is to say), in or about the working, casting, converting, or manufacturing of iron or steel, or any parts, branches, or processes thereof; or in or about the working or cutting of any mines of coal, ironstone, limestone, salt rock; or in or about the working or getting of stone, slate, or clay," &c.

Sect. 25 enacts, that, "in the meaning and for the purposes of

this act, all workmen, labourers, and other persons in any manner engaged in the performance of any work, employment, or operation, of what nature soever, in or about these several trades and occupations aforesaid, shall be and be deemed 'artificers;' and that, within the meaning and purposes aforesaid, all masters, bailiffs, foremen, managers, clerks, and other persons engaged in the hiring, employment, or superintendence of the labour of any such artificers, shall be deemed to be 'employers;' and that, within the meaning and for the purposes of this act, any money or other thing had or contracted to be paid, delivered, or given as a recompense, reward, or remuneration for any labour done or to be done, whether within a certain time or to a certain amount, or for a time or an amount uncertain, shall be deemed and taken to be the 'wages' of such labour; and that, within the meaning and for the purposes aforesaid, any agreement, understanding, device, contrivance, collusion, or arrangement whatsoever, on the subject of wages, whether written or oral, whether direct or indirect, to which the employer and artificer are parties or are assenting, or by which they are mutually bound to each other, or whereby either of them shall have endeavoured to impose an obligation on the other of them, shall be and be deemed a 'contract.'"

The mere fact of his joining in the work does not bring him within it. (He was then stopped by the Court.)

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Greaves and Keating, in support of the rule.—This act is couched in very comprehensive language, and is in its nature remedial. It is therefore right that it should receive a liberal construction. The replication is framed under the 5th section. The question is, whether the plaintiff is a workman or labourer within the true meaning of the act. Now the language of the 25th section is as large and comprehensive as possible; the words are, “all workmen, labourers, and other persons in any manner engaged in the performance of any work, employment or operation, of what nature soever, in or about the several trades and occupations aforesaid, shall be, and be deemed ‘artificers.’” Any workman engaged in any work named in the act is within its provisions, and the plaintiff is not to be deprived of the benefit of it, because he has employed other labourers to join him, and assist him in doing the work. The only case which has much bearing upon this subject is that of *Lowther v. Lord Radnor* (a), which arose under the statute 20 Geo. 2, c. 19, by which magistrates had jurisdiction to determine differences between masters and servants in husbandry, artificers, &c., “and other labourers” employed for any certain time, or in any other manner respecting wages within certain sums. It was there said by *Dampier* in argument, that “It is not inconsistent with the condition of a labourer that he should contract to do the work by the piece, or great, and therefore should employ another labourer under him; many important operations in husbandry are performed in this manner;” and Lord *Ellenborough*, in delivering the judgment of the Court, says, “This complaint must be taken to be true in the terms of

(a) 8 East, 113.

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it, no evidence appearing to have been laid before the magistrates to contradict or vary it, and they have adjudged the same to be true. By this it appears that Sop was a labourer, for he is described as J. Sop, of Shrewton, labourer, and that his demand was for wages due to him, for work and labour done by himself and another person, T. Franklin, by which it must be understood that Sop was employed to do the work, either by the day, or the piece, and that Franklin assisted Sop in the work, under the retainer of Sop, and not of Mr. Lowther; a common practice with labourers as well in husbandry as in other business." The principle seems to be this;—if the person fills a situation mentioned in the act, he comes within the terms of it, and his position in that respect is not altered by the fact of his employing others to work with him. The judgment of the Court, in the preceding case, proceeds thus:—"The act now under our consideration appears to have had for its object the affording to certain servants and workmen, and to labourers in general, a speedy, easy, and cheap mode of recovering their wages when they amount to a small sum These benefits are, by the words of the act, extended to servants in husbandry, to workmen in different branches of trade, and to other labourers employed for any certain time, or in any other manner. The latter words are as general as may be." The words of the stat. 5 Eliz. c. 4, s. 13, "that every artificer and labourer that shall be lawfully retained in and for the building or repairing of any church, &c., or of every other piece of work taken in great, in task or in gross, or that shall hereafter take upon him to make or finish any such thing or work," &c., shew that the legislature, at the time of the passing of that statute, contemplated the taking contracts in gross by labourers and artificers. The 20 Geo. 2, c. 19, has similar words. *Lancaster v. Greaves* (a) was

(a) 9 B. & C. 628.

a decision under the stat. 4 Geo. 4, c. 34, s. 3, which requires the relation of master and servant to exist, in order to bring a case within it. [*Alderson*, B.—Would not the plaintiff have equally performed his contract if he had not worked himself? He did not enter into an engagement to do the work *personally*. He even receives a profit by the labour of others. The 5th section, by which the set-off is prohibited, is remarkably worded. It enacts that, in an action brought for wages, no set-off shall be allowed for goods had and received “by the plaintiff, as or on account of *his wages*, or in reward for *his* labour.” How can it be said in this case, that the goods received were in payment for his (the plaintiff’s) wages or labour? If the plaintiff does any part of the work as a labourer, he comes within the meaning of the act. [*Platt*, B.—Take the case of a man who employs a thousand others under him, but puts the finishing stroke to the work himself, could it be said that he is a workman or labourer within the act?] The plaintiff has acted as a labourer in expending the labour of his own hands in the work, and although he has been joined by others in carrying it on, that fact is not sufficient to deprive him of the protection of the statute.

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PARKE, B.—I am of opinion that this rule ought to be discharged. There are two questions in the present case. The first is, whether the plaintiff is a workman or labourer within the true meaning of this act of Parliament; and secondly, if he is, whether he was engaged in the occupation of the getting of clay, as mentioned in the 19th section. The principal question, and that upon which it will be sufficient for us to express our opinion, is the first. The 19th section enacts, that “nothing herein contained shall extend to any artificer, workman, or labourer, or other person engaged or employed in any manufacture, trade, or

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occupation, excepting only artificers, workmen, labourers, and other persons employed in the several manufactures, trades, and occupations following"—and then certain trades, &c. are enumerated; and if the plaintiff comes within the meaning of this section, the defendant is deprived of his right of set-off by the 5th section, which has been referred to by my Brother *Alderson*, the words of which are, "in respect of any goods, wares, or merchandise, had or received by the plaintiff, as or on account of *his wages*, or in reward for his labour," &c. Now it appears to me that, upon the true construction of this act, it is to be taken as applicable to those persons only who strictly contract as *labourers*, that is, to such as enter into a contract to employ their *personal* services, and to receive payment for that service in *wages*. Is then the plaintiff here a person in that condition—a person who has contracted to do a work *personally*, and to receive payment in wages? I do not think that he is, according to this contract, bound in the least degree to do the work personally. The reward which he is to receive is not to be paid for his personal labour, but it is the contract price from which he may derive a profit, by the assistance and labour of others. It seems to me that this act was intended to be applied to those who engage to do a work by their own personal labour, and that the object of it is to protect such men as earn their bread by the sweat of their brow, and who are, for the most part, an unprovided class, and that it was not intended to have any application whatever to persons who take work upon a great scale. I take it to be clear, that, if the plaintiff had undertaken to do a work for £100,000, he would not have been within the act, although he might have done some portion of it himself. It is difficult to draw the line between such a case as that and the present. In the case of *Lowther v. Lord Radnor*, which was cited in the argument, the decision of the Court

proceeded on the facts laid before the justice, and the facts there stated in the information did shew the relation of master and servant; and the only question raised was, whether a labourer employed in digging a well was within the description of persons made subject to the provisions of the statute. With respect to the other question, as to the getting of clay, it is not necessary to say whether or not the case falls within the statute. I entertain great doubt upon that point.

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ALDERSON, B.—I am of the same opinion. The only question is, whether the defendants are to be deprived of their set-off by virtue of this statute. The facts of the case are few. The plaintiff has entered into a contract with the defendants to do a certain work at a certain sum of money per cubic yard. He works in company with others, whom he engages for certain wages. The defendants have in part paid the plaintiff in articles of food, &c., which the plaintiff has paid to his own workmen as money. The plaintiff cannot, as it appears to me, say that he has violated the act. As far as regards himself, it is to be taken as a payment in money.

ROLFE, B.—I am of the same opinion. It appears to me to be clear, upon looking at this act of Parliament, that it applies only to those persons who are to receive *wages* as the price of their labour, and that the term “wages” is to be understood in its popular sense, and does not include wages which are the price of a contract. The plaintiff here employed several persons under him, and in that respect differs from what is popularly understood by a labourer. This act was intended to protect persons who earn their bread by their daily labour from receiving goods as a payment for their wages instead of money. It would be difficult to know where to draw the line, if we were to hold that the

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plaintiff falls within the meaning of the act; for it would be difficult to say that it did not apply in a case where a party had undertaken a contract to complete twenty miles of railway. The 19th section seems to me to have reference to workmen and labourers who earn wages by their own personal labour, and not to those who, although they join in the work, derive a profit from the exertions of others.

PLATT, B.—I am of the same opinion, and I agree that the opinion of the learned judge at the trial was correct. I do not see the limit to which the doctrine, for which the plaintiff contends, might not be carried. It cannot be said that every person who puts the finishing stroke to a work, as, for instance, a master mason engaged to build a house, is within this act. I think, therefore, that the rule ought to be discharged.

Rule discharged.

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ASSUMPSIT.—The first count of the declaration stated, that, before the issuing of the fiat in bankruptcy therein-after mentioned, to wit, on &c., the plaintiff, at the special instance and request of the defendant, made and entered into and duly signed, according to the statute in such case made and provided, a certain contract of guarantee in writing, to and with a certain banking copartnership, called the Ashton, Stalybridge, Hyde, and Glossop Bank, being a copartnership of persons then and from thence hitherto and still carrying on the trade and business of bankers in England, by and under the name and description aforesaid, under and by virtue of and according to the statute made and passed in the 7th year of the reign of King George the Fourth, for, amongst other things, the better regulating of copartnerships of certain bankers in England, by which said contract of guarantee the plaintiff, in consideration

Assumpsit.
The declaration set forth a guarantee, whereby, in consideration that a banking copartnership would make advances to the defendant, the plaintiff undertook to guarantee the copartnership the due payment of sums advanced not exceeding £250. Averment, that the copartnership made advances to the defendant, who afterwards became bankrupt, and that, at the time of his bankruptcy,

there was due to the company, for such advances a sum exceeding £250; that, after the issuing of the fiat, the defendant, in consideration of the premises, promised the plaintiff that if, by virtue of the guarantee, the plaintiff should be called upon to pay the copartnership the said sum of £250, the defendant would repay the same to the plaintiff when it should be in his power, notwithstanding he should previously obtain his certificate, and also interest on the said sum; and that the plaintiff, being called upon under the guarantee, paid to the copartnership £250, of which the defendant had notice. Breach, nonpayment. On general demurrer,—*Held*, no objection to the promise that it was made before certificate. Also, that the mere liability to repay the plaintiff was an equally good consideration to support the promise as an existing debt. Also, that the conditional promise to pay when the defendant was able was good, as supported by the original consideration. Also, that the promise to pay interest was supported by the same consideration as the original promise.

To a count for money paid, the defendant pleaded his bankruptcy and certificate, and that the money was paid after the fiat on account of a debt due from the defendant to a banking company, and for which the plaintiff was liable. Replication, that the liability arose from the plaintiff's, before the fiat, signing a guarantee for the defendant at his request, whereby, in consideration of the company making advances to the defendant on account, the plaintiff guaranteed the sum advanced, so that his liability did not exceed £250; and that, in the event of the defendant's bankruptcy, and the debt to the banking company exceeding £250, the company might elect which part of the account might be secured by the guarantee, and might prove the whole of the money due on any securities against the defendant's estate, and apply all the dividends in consideration of the debt beyond the £250, and that the plaintiff should only be entitled to the benefit of any proof or dividend after the company should have received the full amount owing to them, and that the company might recover the full amount guaranteed from the plaintiff; that large advances were made by the banking company, and that they proved the whole sums due to them, and forced the plaintiff to pay the £250 for which he was security to the bankers for the bankrupt. On demurrer to the replication,—*Held*, that the plaintiff's debt was barred by the 52nd and 121st sections of the Bankrupt Act 6 Geo. 4, c. 16.

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that the said copartnership would make advances to the defendant in current account with the said copartnership, did undertake and agree to guarantee to the said copartnership for the time being, of whomsoever the same might from time to time consist, the due and punctual payment, when required, of all such sums of money as might have been or might be from time to time advanced or paid by or from the said copartnership, or which the same copartnership might have already paid or become liable to pay, or might thereafter pay or become liable to pay to, for, or on account of the defendant or his order, or for or on account of any dealings or transactions with or through any of the banks of the said copartnership, by reason of his being the drawer, indorser, acceptor, or negotiator, of any bill or bills, note or notes, or other negotiable securities, or on any other account whatsoever, with interest, commission, and other banking charges upon such sums, and that without regard to any change or alteration in the proprietary of or partners in the said copartnership, but so as the liability of the plaintiff should not, in any event, exceed at any one time the sum of £250; and for the consideration aforesaid, the plaintiff, at the request of the defendant, thereby further agreed to and with the said copartnership as follows, (that is to say,) that the said guarantee or engagement should be considered as a continuing guarantee, and should not be withdrawn, but should continue in full force until three months after notice to the manager of the said copartnership, in Ashton-under-Lyne, in writing under the hand of the plaintiff, of his, the plaintiff's, intention to discontinue or determine the same; and also in the event of the bankruptcy or insolvency of the defendant, and of there then being or thereafter becoming due or payable from or by him to the said copartnership, as then constituted, a larger sum than the said sum of £250, by reason of or upon any of the matters or accounts aforesaid, then the said copartnership might elect and choose what items

in the account between the said copartnership and the defendant should be considered as secured by the said guarantee of the plaintiff, and might prove the whole or any parts or part of the monies which should be then due or owing to them, or any bills, notes, or other securities, which they might then or thereafter hold against or upon the estate of the defendant, and against or upon the estate of any other person or persons who might be liable thereto or thereupon, or to or upon any of them, and might apply, take, and retain the whole of the dividends or dividend to be received upon any such proofs or proof, in part or full satisfaction, as the case might be, of the amount which should be due or owing to the said copartnership as then constituted, over and beyond the said sum of £250 thereby guaranteed; and that the plaintiff should only be entitled to the benefit of any proof or proofs, dividend or dividends, to be made as aforesaid, after the said copartnership should thereby or therewith, and by or with the money to be recovered upon that guarantee, have received the full amount which should be due and owing to them by the defendant as aforesaid; and also that the said copartnership might recover against the plaintiff to the full extent or amount of that guarantee or engagement, notwithstanding any such proof or proofs as aforesaid, and notwithstanding they might hold or be entitled to the benefit of any other guarantee or guarantees, or security or securities, for the payment of any sum or sums of money which were or might become due or payable to them from the defendant. And the contract of guarantee being so made and entered into by the plaintiff, to wit, on &c., the plaintiff from thence until the issuing of the fiat in bankruptcy thereafter mentioned, at the request of the defendant, forbore to withdraw the said guarantee, and suffered and permitted the same to continue, and the same did continue during all that time in full force; and that, after the making of the said contract of guarantee, and before the bankruptcy of the defendant,

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as thereafter mentioned, to wit, on &c., and on divers other days and times between that day and the said bankruptcy, the said copartnership made divers advances to the defendant in current account with him, the defendant, to a large amount, to wit, the amount of £5000; that afterwards, and after the making of the said advances to the defendant by the said copartnership, to wit, on &c., the defendant, then being a trader within and subject to the statutes then in force concerning bankrupts, to wit, a paper manufacturer, became and was a bankrupt within the true intent and meaning of the said statutes, and thereupon afterwards, to wit, on &c., a fiat in bankruptcy was duly and in due form of law issued against the defendant, under and by virtue of which said fiat the defendant afterwards, to wit, on &c., was duly and in due form of law adjudged and declared to be a bankrupt accordingly; that at the time of the bankruptcy of the defendant, and of the issuing of the fiat against him, to wit, on &c., there had become and then was due and payable from and by the defendant to the said copartnership as then constituted, for and by reason and in respect of the said advances, and the said other matters and accounts aforesaid in the said contract of guarantee mentioned, a large sum of money, exceeding the said sum of £250, to wit, the sum of £5000, whereof the defendant then, and at the time of the making of the contract and promise of the defendant thereafter mentioned, had notice. And the said sum of money being and continuing due and payable from the defendant to the said copartnership after the issuing of the said fiat, to wit, on &c., the defendant, by a certain contract then made in writing, and signed by him according to the statute in such cases made and provided, in consideration of the premises, promised the plaintiff, that if the plaintiff, upon and by virtue of the said contract of guarantee, and according to the terms thereof, should be called upon and forced and obliged by the said copartnership to pay to them, and should

and did pay to them, the said sum of £250, he, the defendant, would repay the same to the plaintiff, when it should be in his power so to do, notwithstanding he, the defendant, should previously have obtained his certificate under the said bankruptcy; and also that the defendant would pay on request to the plaintiff interest upon the said sum of £250, or so much thereof as should from time to time remain and continue unrepaid to the plaintiff for and during such time after the payment thereof by the plaintiff to the said copartnership, as the same or any part thereof should so remain and continue unrepaid to the plaintiff. And the plaintiff further says, that the said sum of money being and continuing due and payable from the defendant to the said copartnership after the issuing of the said fiat, to wit, on &c., the said copartnership, in pursuance of the said contract of guarantee, and upon the terms thereof, proved the whole of the said sum of money so then due and payable to them from the defendant as aforesaid, against the estate of the defendant, and afterwards, and before the payment by the plaintiff as hereinafter mentioned, to wit, on &c., the whole estate of the defendant was divided under the said bankruptcy, and upon that division, the said copartnership, in pursuance of the said contract of guarantee, and upon the terms thereof, received the whole of the dividends of the said estate upon the said proof so made by them as aforesaid, and applied, took, and retained the same towards payment and satisfaction of the said sum of money so due and payable to them from the defendant as aforesaid; and that, after such application and retention of the said dividends by the said copartnership, in reduction of the said sum so due and owing to the said copartnership, and by them proved against the estate of the defendant as aforesaid, and after recovery by the said copartnership of so much of the same sum as could be recovered upon or from the estate of any other person liable thereto, or upon or from any other guarantee or security, or any otherwise, there remained of

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the said sum a certain balance or residue over and above the amount of the said dividends and other monies so recovered and applied as aforesaid, and which the same were insufficient to satisfy, and did not satisfy, greatly exceeding the said sum of £250, to wit, the sum of £1000; and thereupon afterwards, and after the making of the said contract in writing of the defendant, to wit, on &c., the said balance or residue of the said sum of money so being and remaining wholly due and unsatisfied to the said copartnership, the said copartnership, being then lawfully entitled so to do, did, upon and by virtue of the said contract of guarantee, and according to the terms thereof, call upon, and force and oblige the plaintiff to pay, and the plaintiff did accordingly pay to the said copartnership the said sum of £250, whereof the defendant then had notice: that, although afterwards and after the said payment by the plaintiff, to wit, on &c., the defendant, in part of the performance of his said contract and promise in that behalf, repaid to the plaintiff a certain part, to wit, the sum of £50, of the said sum of £250 so paid by the plaintiff to the said copartnership as aforesaid, and although afterwards, and before the commencement of this suit, to wit, on &c., it was, and from thence hitherto has been and still is in the power of the defendant to repay, and the defendant was then and often times afterwards requested by the plaintiff to repay, and ought then to have repaid to him, the said plaintiff, the residue of the said sum of £250, to wit, the sum of £200, according to his contract and promise in that behalf, yet the said defendant, not regarding his said contract and promise, has not as yet repaid to the said plaintiff the said residue or any part thereof, &c.—The declaration then alleged that 52*l.* 4*s.* was due for interest upon the sum so paid by the plaintiff, yet the defendant had not paid the same.

The declaration also contained counts for money paid, and money due on an account stated.

To the first count there was a plea, stating that the pro-

mise was made before certificate, which plea being specially demurred to, the defendant abandoned the plea, and relied on objections to the declaration.

Ninth plea: to the second count, and so much of the last count as relates to the £250, that, before the time of the paying of the said sum of £250 by the plaintiff, and from thence until the issuing of the fiat in bankruptcy herein-after mentioned, the defendant was a dealer and trader, &c. [The plea then stated the petitioning creditor's debt, the act of bankruptcy, the issuing of the fiat, the adjudication that the defendant had become bankrupt, the notice thereof in the Gazette, the surrender and examination of the defendant, and allowance of his certificate before the commencement of the suit. It then alleged that the sum of £250, parcel of the sum in the second count, was money paid by the plaintiff in discharge of a certain debt of the defendant, due to "The Ashton, Stalybridge, and Glossop Bank," and that the sum of £250, parcel of the sum in the last count, was the same identical sum of £250 in the second count mentioned to have been paid by the plaintiff for the defendant, and that the account was stated of and concerning the said sum of £250.] And the defendant further saith, that the debt so due to "The Ashton, Stalybridge, and Glossop Bank," was a debt of the defendant, to and for which the plaintiff had become and was liable before the defendant became a bankrupt, and before the issuing of the said fiat, to wit, on &c., and to and for which debt the plaintiff became and was liable, and remained and continued so liable up to the time of the bankruptcy of the defendant, and of the issuing of the fiat against him; that the plaintiff, so being and remaining liable to the said debt of the bankrupt, as aforesaid, after the issuing of the said fiat, to wit, on &c., in respect of his said liability as aforesaid, paid and discharged the same debt to the said copartnership without any request from the defendant, save and except the request supposed to arise by him from the premises in this plea

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mentioned, which is the request in the second count mentioned; that the plaintiff, when he became liable as aforesaid, had not notice of any act of bankruptcy by the defendant committed; and that the payment so made by the plaintiff to the said copartnership is the same payment so made by him as in the second count mentioned. Verification.

Replication.—That the liability of the plaintiff for and in respect of the said debt of £250, due from the defendant to the copartnership of persons in the last plea mentioned, and in discharge of which liability the plaintiff, after the issuing of the said fiat in bankruptcy, paid the said debt to the said copartnership, as in that plea mentioned, was contracted and arose in manner and form following, and not otherwise, (that is to say), by the plaintiff, before the bankruptcy of the defendant and before the issuing of the said fiat, to wit, on &c., for the benefit and accommodation of the defendant, and at his special instance and request, making and duly signing, according to the statute in such case made and provided, a certain contract of guarantee in writing to and with the said copartnership, whereby, in consideration that the said copartnership would make advances to the defendant in current account with the said copartnership, the plaintiff did undertake and agree to guarantee to the said copartnership, &c. [The replication set out the guarantee *verbatim* as in the first count, and stated, in the same terms, that it continued in force until the issuing of the fiat, that the copartnership made advances to the defendant, and that afterwards the defendant became bankrupt, and a fiat issued.] And the plaintiff further says, that, at the time of the said bankruptcy and of the issuing of the said fiat, there had become and then was due and payable from and by the defendant to the said copartnership as then constituted, for and by reason and in respect of the said advances and the said other matters and accounts in the said contract of guarantee mentioned, a large sum of money, greatly exceeding the said sum of £250, to wit, the sum of £5000; and the said sum of

money being and continuing due and payable from the defendant to the said copartnership after the issuing of the said fiat, and after the defendant was so adjudged a bankrupt as aforesaid, to wit, on &c., the said copartnership, in pursuance of the said contract of guarantee and upon the terms thereof, proved the whole of the said sum so then due and payable from the defendant as aforesaid, against the estate of the defendant, and afterwards, and before the payment by the plaintiff as hereinafter mentioned, to wit, on &c., the whole estate of the defendant was divided under the said bankruptcy, and upon that division, the said copartnership, in pursuance of the said contract of guarantee, and upon the terms thereof, received the whole of the dividends of the said estate upon the said proof so made by them as aforesaid, and, as they were lawfully entitled to do under and by virtue of the said contract of guarantee, applied, took, and retained the same towards payment and satisfaction of the said sum of money so due and payable to them from the defendant as aforesaid; that, after such application and retention of the said dividends by the said copartnership in reduction of the said sum of money so due and owing to the said copartnership, and by them proved against the estate of the defendant as aforesaid, and after the recovery and application by the said copartnership, in further reduction of the same sum, of all such other monies applicable to the payment thereof as could be recovered upon or from the estate of any other person liable thereto, or upon or from any other guarantee or security, or otherwise, there remained of the said sum a certain balance or residue over and above the amount of the said dividends and other monies so recovered and applied as aforesaid, and which the same were insufficient to satisfy, and did not satisfy, greatly exceeding the said sum of £250, to wit, the sum of £1000, and the said balance being and remaining wholly due and unsatisfied to the said copartnership, afterwards, to wit, on &c., the said copartnership, being then lawfully entitled so

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to do, did, upon and by virtue of the said contract of guarantee, and according to the terms thereof, call upon and force and oblige the plaintiff to pay, and the plaintiff did then accordingly pay, to the said copartnership the said sum of £250, parcel of the said balance or residue, being the same sum of £250, parcel &c., in the introductory part of the last plea mentioned, and the said payment of the said sum of £250, parcel &c., being the same payment thereof by the plaintiff in the second count of the declaration and last plea respectively mentioned; that, at the issuing of the said fiat, the plaintiff had not become nor was he liable for the said debt of £250 of the defendant, except or otherwise than as in this replication mentioned; and the plaintiff never was at any time entitled to prove for the said last-mentioned debt, under the said fiat, against the estate of the defendant, or to stand in the place of the said copartnership in respect of their said proof of the said debt. Verification.

General demurrer, and joinder.—The defendant's point was, that the replication does not shew that the plaintiff might not have proved against the bankrupt's estate for the amount for which he was surety, and does not, therefore, avoid the effect of the certificate.

In last Michaelmas Vacation, (December 1), *Maynard* argued for the plaintiff.—The declaration is good on general demurrer. There is no difference between a promise of this nature made by a bankrupt before certificate, and one made after: *Kirkpatrick v. Tattersall*(a). [*Parke*, B.—Assuming that to be so, the question is, whether you can extend to a contingent liability the same doctrine which applies to an existing debt which would be barred by a certificate ?] The principle is the same. A promise to pay upon a contingency becomes, when the contingency happens, an absolute promise to pay on request:

(a) 13 M. & W. 766.

Humphreys v. Jones (a). But the plaintiff is not driven to rely on the new promise. It is true that this count does not in terms allege a promise to pay on request, but it shews upon the face of it a subsisting liability to repay the plaintiff on request, inasmuch as it appears that the money has been paid by the plaintiff for the defendant, at the defendant's request. For that reason, the omission of a promise to pay on request does not render the count bad: *Brown v. Boorman* (b). It is different from the case of *Hayter v. Moat* (c); for there the declaration did not state that the defendant was indebted to pay on request, but left it doubtful whether the debt alleged might not be a debitum in præsentī solvendum in futuro. Here it appears that the defendant would at all events be liable to repay the plaintiff on request, if he had not obtained his certificate; but it will be contended that the promise declared on is a promise to pay when able; and the liability of the plaintiff to pay the defendant's debt to the bank, being an *executed* consideration, could not be made the consideration for any promise which the law would not imply from it. But the promise of the defendant subsisting at the time the new promise was made, was founded on a consideration merely *executory*, and might, before breach, have been rescinded by mutual consent, and a new one substituted: *Taylor v. Hilary* (d). If the count had alleged that in consideration of the plaintiff, at the defendant's request, *having agreed* to pay the bank, the defendant promised to repay him, such, no doubt, would have constituted an *executory* contract: *Tanner v. Moore* (e), *Payne v. Willson* (f). The original implied contract between the plaintiff and defendant was in effect the same; it was, in consideration of there being a continuing agreement on the part of the plaintiff to pay the bank, the defendant promised to repay him

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(a) 14 M. & W. 1.

(b) 11 Cl. & Fin. 1.

(c) 2 M. & W. 56.

(d) 1 C., M., & R. 741.

(e) 9 Q. B. 1.

(f) 7 B. & C. 423.

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on request: that is an executory, not an executed consideration,—a promise of which there could be no breach until after the plaintiff had paid the bank. It might therefore be rescinded before the plaintiff had paid the bank, and a contract to pay when able substituted. It is not like the case of a promise arising from the executed consideration of an antecedent debt, which it is conceded will not support a promise to pay in futuro founded on the same consideration: *Hopkins v. Logan* (a). But the promise to pay when able applies only to the event of the certificate being obtained, and does not supersede the liability to pay on request, except in that event. For such a promise the consideration is sufficient, though it be an executed consideration. In the case of a promise subsisting on an executed consideration to pay on request, there may be a new valid promise to pay, notwithstanding the debtor's original liability is extinguished by the Statute of Limitations, or a certificate in bankruptcy: *Hawkes v. Sanders* (b). In a note to the case of *Wennall v. Abney* (c), the rule is thus stated:—"An express promise, as it should seem, can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision." Following out the principle there laid down, it is held that the same consideration may, *before* the statute has run against the original implied promise, or *before* it is barred by the certificate in bankruptcy, be made the foundation of a new express promise to pay on request *after* the statute has run or the certificate been obtained; and why should it not be equally a good consideration to pay after those

(a) 5 M. & W. 241.

(b) Cowp. 290.

(c) 3 Bos. & P. 252.

events when the debtor shall be able? The first count, therefore, shews that the defendant is liable at all events by virtue of his original liability, if he has *not* obtained his certificate, and by virtue of a new valid promise if he *has* obtained his certificate.—Another objection to the declaration is, that the consideration alleged does not support the promise to pay interest. If that part of the promise be invalid, it does not vitiate the other, which relates to the principal, but the good part may be separated from the bad: *Wood v. Benson* (a), *Mallan v. May* (b). It is submitted, however, that there is no objection to the promise so far as it relates even to interest. If the original contract was executory, the new promise might well include a promise to pay interest. There is no authority that a subsisting liability to pay the debt of another is not a sufficient consideration for a promise by the debtor to pay interest to the party liable as surety after payment by him. Indeed the law in many cases will imply this promise from forbearance.

The question which arises on the demurrer to the replication is, whether, under the circumstances therein stated, the plaintiff's debt was barred by the 6 Geo. 4, c. 16, ss. 52 (c),

(a) 2 C. & J. 94; 2 Tyrw. 93.

(b) 11 M. & W. 653.

(c) Enacts, "That any person who, at the issuing the commission, shall be surety or liable for any debt of the bankrupt, or bail for the bankrupt, either to the sheriff or to the action, if he shall have paid the debt, or any part thereof in discharge of the whole debt, (although he may have paid the same after the commission issued), if the creditor shall have proved his debt under the commission, shall be entitled to stand in the place of such creditor as to the divi-

dends and all other rights under the said commission which such creditor possessed or would be entitled to in respect of such proof; or, if the creditor shall not have proved under the commission, such surety or person liable, or bail, shall be entitled to prove his demand in respect of such payment as a debt under the commission, not disturbing the former dividends, and may receive dividends with the other creditors, although he may have become surety, liable, or bail as aforesaid, after an act of bankruptcy committed by such bank-

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121 (a). The case of *Jackson v. Magee* (b) will be relied upon by the other side. That was an action for money paid, to which the defendant pleaded his bankruptcy and certificate, and that the money was paid for a debt of the defendant for which the plaintiff was surety; that the debt was due, and the plaintiff liable for it, before the bankruptcy; and that the money was paid without any request from the defendant, except such as might legally arise from the premises; and that the surety had not, when he became liable, notice of any act of bankruptcy. To that the plaintiff replied, that, before the payment, the defendant had obtained his certificate, and a final dividend had been made, and that there was not at any time any debt in respect of the payment of which the plaintiff could have proved and received a dividend. On demurrer to the replication, it was held that the certificate was a discharge from the claim, as the principal creditor might have proved, and, if he had, the plaintiff would have been entitled to the benefit of that proof, either in reduction of his liability to the creditor, if the creditor received the dividends, or by receiving the dividends himself if he paid the whole debt to the creditor; or the plaintiff might have paid the debt at once to the creditor, and have himself proved

rupt: provided that such person had not, when he became such surety or bail, or so liable as aforesaid, notice of any act of bankruptcy by such bankrupt committed."

(a) Enacts, "That every bankrupt who shall have duly surrendered, and in all things conformed himself to the laws in force concerning bankrupts at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands

hereby made provable under the commission, in case he shall obtain a certificate of such conformity, so signed and allowed, and subject to such provisions as hereinafter directed; but no such certificate shall release or discharge any person who was partner with such bankrupt at the time of his bankruptcy, or who was then jointly bound or had made any joint contract with such bankrupt."

(b) 3 Q. B. 48; 2 G. & D. 402.

before any dividend was declared; or, if the creditor would not take the debt, the plaintiff might have compelled him to prove for the plaintiff's benefit. But that case is distinguishable, inasmuch as there the surety might have proved and did not; here, however, by the terms of the guarantee, to which the defendant must be taken to be privy, (for it is averred to be made at his request,) it is stipulated that the debt should not be proved by the surety. The case of *Ex parte Hope* (a) shews, that under such circumstances the surety could not prove. There is nothing contrary to the policy of the bankrupt law in allowing a person to contract a debt upon the terms that he shall be liable notwithstanding his bankruptcy and certificate. The contract is, that the bank shall have the right of proving the entire debt for its own benefit, and that the surety shall derive no advantage from such proof, but shall be liable to the extent of £250, if so much remains unpaid; the effect of such a contract is, that the bankrupt continues liable after his certificate. The 52nd section of the 6 Geo. 4, c. 16, does not render the debt of a surety necessarily provable in every case, but it contemplates a debt, which the surety having paid may prove.

Atherton, contra.—First, the contract set out in the special count is either a contract to pay after certificate, or to pay when able, before or after certificate. Such a contract is invalid, as binding the defendant to what he cannot perform, namely, pay in full a particular creditor before he has obtained his certificate, or as being repugnant to the general policy of the bankrupt law, which requires the bankrupt's estate to be distributed amongst his creditors.—Secondly, there is no authority to shew that a mere contract of guarantee, entered into on behalf of a party before his bankruptcy, is a sufficient consideration to support a pro-

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(a) 3 M., D., & De G. 720.

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mise to indemnify notwithstanding a certificate. It is different from the case of an existing debt, for there the party has had the full benefit of the contract which previously subsisted, and may well waive a provision introduced for his benefit.—Thirdly, the contract is founded on an executed consideration. At the time it was entered into, there was a liability subsisting between the defendant and the plaintiff; for the latter having become surety for the former, the law would imply a liability that, in the event of the plaintiff at any future time being compelled to pay money under the guarantee, the defendant would reimburse him on request. That is not the less an executed consideration, because it points to a future contingency. The defendant being liable on a given event forthwith to pay a sum of money, makes an express contract, that, on the recurrence of the same event, he will pay if he is able. [*Parke, B.*—A debt barred by a certificate of bankruptcy, or the Statute of Limitations, is a good consideration to support a promise to pay it.] That is a promise *absolute* to pay after certificate: here there was a condition attached, large enough to impose the obligation of payment before certificate. It is an express promise, made on a previous implied promise without consideration. A state of facts from which the law will imply a liability to pay on a given event, will not support a promise to pay when able.—Fourthly, the consideration disclosed in the count is not sufficient to support the promise to pay interest. It is conceded that a contract may be binding as to certain terms, and also contain others to which the law will give no efficacy; but this contract is stated according to its legal effect, and, unless it can be sustained to its full extent, it fails altogether. It is like the case of a parol promise to pay the debt of another, and also to do some other thing, which is one indivisible contract, and the plaintiff cannot recover on any part: *Chater v. Beckett (a)*. In

Wood v. Benson (a) the difficulty was obviated by a count for goods sold and delivered, under which it was held that the amount of the valid portion of the contract might be recovered. Unless there is either an express agreement by the creditor to give time, or a stipulation to that effect can be collected from the terms of the contract, a subsisting debt is not a good consideration for a promise to pay interest, any more than it would be for a promise to pay the debt, or do any other thing. To support one part of this contract without the other, would be to give to it a legal effect different from that which the plaintiff has stated.

As to the last point, the question is, whether the special terms of the contract of suretyship took the case out of the 52nd section of the 6 Geo. 4, c. 16. That section in substance enacts, that if the creditor has proved, the surety, on paying the creditor, shall stand in his place; or, if the creditor has not proved, the surety may prove, not disturbing former dividends. The words of that section are too plain to admit of doubt. They shew that the present claim was provable; and if so, the special terms of the guarantee could not prevent the operation of the enactment. The 5 & 6 Vict. c. 122, s. 37, which defines the effect of a certificate, declares it a discharge from all claims and demands "*made provable*." The bankrupt is not to be deprived of his protection, because the surety thinks proper to agree that he shall have no benefit even if he should prove. At the time of the issuing of the fiat the plaintiff was a surety, liable for the debt of the bankrupt; and consequently, on paying the principal creditor, was entitled to stand in his place if he proved, or, if the creditor failed to prove, to come in himself and prove. It is immaterial that the defendant was privy to the contract between his surety and creditor, for the protection given by certificate is a benefit of which a bankrupt cannot, by anticipation, deprive himself.

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(a) 2 C. & J. 94; 2 Tyrw. 93.

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If a contract for the loan of money contained an express stipulation that no certificate in bankruptcy should bar the debt, the creditor being clearly entitled to prove, such stipulation could not deprive the bankrupt of the protection of an express enactment, founded on an obvious public policy.

Maynard replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—This case was very fully and ably argued before my Brothers *Alderson*, *Rolfe*, *Platt*, and myself, at the sittings after last Michaelmas Term. Two questions arose, the first, as to the sufficiency of the first count on general demurrer; the second, whether the pleadings to the second count, which was for money paid, disclosed a sufficient defence. The first count was, in substance, on a promise in writing by the defendant to the plaintiff, in consideration of the defendant's liability, to repay the plaintiff a debt which he had contracted with a banking company as surety for the defendant before the bankruptcy; and the promise was made, before the certificate, to repay the debt when the plaintiff should have paid it, and also the interest on that debt from the time it should be paid by the plaintiff to the time of repaying by the defendant. There was a plea stating that the promise was before certificate, and a special demurrer to the plea, on the ground that it merely stated what was admitted before in the declaration. That is true,—and the consequence is, that the question is simply whether the first count is good on general demurrer.

So far as relates to the objection, that the promise was made before the certificate, the case of *Kirkpatrick v. Tattersall* (a) is an answer. It may be worth while to state, that a similar point had been previously decided by Lord Chief Justice *Eyre*, in the case of *Roberts v. Morgan* (b).

(a) 13 M. & W. 766.

(b) 2 Esp. 786.

The next objection was, that, although an existing debt which would be barred by a certificate, and which was due by the bankrupt to the plaintiff, was a good consideration to support a promise to pay it, a mere liability to repay the plaintiff when he should have first paid the debt for the defendant was not. This goes a step further than the cases above cited, but seems to us to fall within the same principle. This liability, like the debt, would be discharged by the certificate; and it seems to us as just and reasonable for the bankrupt, after the fiat, to waive the benefit of his certificate with respect to it, as it is to waive it with respect to a debt; and if the debt so discharged is a good consideration for a promise to pay it, the liability which is discharged in the same way is a good consideration for a promise to continue liable.

Two further objections were made, on the supposition that this liability is to be put on the same footing as a debt, and is a good consideration: first, that this debt or liability, in a course of being barred by a certificate, cannot be treated as the executed consideration for a promise which a debt or liability, not barred by a certificate, would not support, and that by the course of modern decisions, beginning with the case of *Hopkins v. Logan* (a), and ending with *Roscorla v. Thomas* (b), a debt cannot be laid as an executed consideration for any promise which the law would not imply from it; and that a promise to pay whenever the party was able, was never implied. The second was, that a promise to pay interest could not be supported by the consideration, and was as objectionable as if the promise had been to do any collateral thing. We think that these objections ought not to prevail.

The strict rule of the common law was no doubt departed from by Lord Mansfield, in *Hawkes v. Sanders* (c) and *Atkins*

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(a) 5 M. & W. 241.

(b) 3 Q. B. 234.

(c) Cowp. 200.

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v. *Hill* (a). The principle of the rule laid down by Lord *Mansfield* is, that where the consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision of the statute or common law, meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it. There is a very able note to the case of *Wennall v. Abney* (b), explaining this at length. The instances given to illustrate the principle are, amongst others, the case of a debt barred by certificate and by the Statute of Limitations; and the rule in these instances has been so constantly followed, that there can be no doubt that it is to be considered as the established law. Debts so barred are unquestionably a sufficient consideration for every promise absolute or unqualified, qualified or conditional, to pay them. Promises to pay a debt simply, or by instalments, or when the party is able, are all equally supported by the past consideration, and when the debts have become payable instanter, may be given in evidence in the ordinary declaration in *indebitatus assumpsit*. So, when the debt is not already barred by the statute, a promise to pay the creditor will revive it and make it a new debt, and a promise to an executor to pay a debt due to a testator, creates a new debt to him. But it does not follow that, though a promise revives the debt in such cases, any of those debts will be a sufficient consideration to support a promise to do a collateral thing, as to supply goods, or perform work and labour; and so indeed it was held in this count in the case of *Reeves v. Hearne* (c). In such case it is but an accord unexecuted, and no action will lie for not executing it.

We think, therefore, that the conditional promise to pay the debt would be good in this case, and supported by the

(a) Cowp. 288. (b) 3 Bos. & P. 252. (c) 1 M. & W. 323.

original consideration; and a conditional promise, which, when absolute, will be only a renewal of the original liability, and to the same extent, is equally good and supported by the original consideration.

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The next objection relates to the interest. It seems to us to be supported by the same consideration as the original promise. The promise is to pay the debt conditionally; and, if the debt be unpaid, that the defendant will pay interest for it. We are of opinion, therefore, that the first count is good.

The remaining question is, whether on the pleadings there is a sufficient answer to the second and third counts for money paid, and on an account stated to the amount of £250. The ninth plea, which is pleaded to this part of the plaintiff's demand, states that the £250 was paid after the fiat, on account of a debt due from the defendant to a banking company, for which the plaintiff was liable to the company. To this there is a replication, stating the manner in which the liability to the debt was contracted; that is, by the plaintiff signing a guarantee for the defendant at his request, before the fiat, to the banking company for his account, the liability not to exceed £250, upon an agreement that, in the event of bankruptcy, and the debt to the bankers exceeding £250, the company might elect what part of the account might be secured by the guarantee, and might prove the whole monies due on any securities against the defendant's estate, and apply all the dividends in satisfaction of the debt beyond the £250, and that the plaintiff should only be entitled to the benefit of any proof or dividend after the company should have received the full amount owing to them, and that the company might recover the full amount of the guarantee from the plaintiff. The replication then states large advances made by the banking company to the defendant; it then alleges that the banking company proved the whole sum due to them, and forced the plaintiff to pay the £250 for

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which he was security to the banking company. To this there is a general demurrer, and the question argued was, whether, under these circumstances, the plaintiff's debt was barred by the 6 Geo. 4, c. 16, ss. 52, 121.

It is clear that the plaintiff was, at the date of the fiat, a surety or person liable for the debt of the bankrupt, and, though he did not prove, he would have been barred: see the case of *Jackson v. Magee* (a). But it was argued that the bankrupt must be taken to have been privy to the terms of the guarantee, and to have assented that the debt should not be proved, and, consequently, to have waived the benefit of his certificate as to that debt. So much of the agreement as is set out in the replication to the ninth plea does not warrant that inference, and the residue which appears in the declaration does; but the effect of that agreement, as stated in the replication, is no more than this, that the plaintiff, being entitled to prove, or stand in the place of the banking company quoad the £250, gave up that benefit to the company. It seems to us that the defendant is, nevertheless, fully entitled to be discharged from it by his certificate.

Our judgment, therefore, will be for the plaintiff on the first count, for the defendant on the demurrer to the replication to the ninth plea to the second count.

Judgment accordingly.

(a) 3 Q. B. 48; 2 G. & D. 402.

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LOCKETT and Another v. NICKLIN.

Feb. 12.

DEBT for goods sold and delivered. Plea, nunquam indebitatus.

At the trial, before *Patteson, J.*, at the Summer Assizes for Suffolk, 1847, it appeared from the plaintiffs' evidence that they were patent grease manufacturers at Norwich, and that on the 24th December, 1846, the defendant, who was an ironmonger at Wolverhampton, sent to them the following order:—

“Wolverhampton, Staffordshire,
Dec. 24, 1846.

“Messrs. Lockett & Co.,

“For T. B. Nicklin & Co., two casks railway grease, stiff, marked (488) on each cask, about 10 or 12 cwt. each, 10s.; one cask 10 cwt., marked (H.)

“Let these be sent to Mr. Ebberly & Co., 7, Paddington Wharf, London, to our order; invoice, per post, early as possible, and if approved, as I told Mr. Lockett, will give you further orders. Let no other mark be on the casks, but the above in red paint.

“Send us a full priced list of all goods you get up on sale.”

The goods were accordingly forwarded to the defendant, and the following invoice sent by post:—

The defendant ordered goods by letter, which did not mention any time for payment. The plaintiff sent the goods and an invoice:—*Held*, that parol evidence was admissible to shew that the goods were supplied on credit, the letter not being a valid contract within the Statute of Frauds.

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"Norwich, Dec. 28, 1846.

"Messrs. Nicklin & Co.,

"Bought of W. Lockett & Co.,
 Patent Grease Makers, Foundry Wharf, Norwich,
 And Tanner's Lane, Ipswich.

"Bt.

2 Pun. Pat. Railway Grease,

Marked, N. (488) 1 . . 16 2 0 — 1 2 24

N. (488) 2 . . 16 1 23 — 1 2 24

1 Marked N. (H.) 14 0 0 — 1 2 0

46 3 23 4 3 20

Fare . . 4 3 20

42 0 3 a 10s. £21 0 4

"Carriage paid to London.

"To be left at W. Ebbern & Co.'s, 7, Paddington Wharf."

Similar orders were given by the defendant on the 30th December, 1846, and 21st January, 1847, and goods were accordingly forwarded and invoices sent. On the part of the defendant, parol evidence was tendered to prove that the terms on which the defendant gave the orders were six months' credit, and a bill at three months. This evidence was objected to, as varying the written contract. The learned judge ruled that the evidence was admissible, not for the purpose of varying the contract, but of supplying the omission in the written document as to the time of payment; and a verdict was found for the defendant, leave being reserved for the plaintiffs to move to enter a verdict for them.

A rule nisi having been obtained accordingly,

Fitzpatrick (*Byles*, Serjt., with him) shewed cause.—
 Parol evidence was admissible for the purpose of proving

that the time of credit had not expired. The reason assigned by Lord *Coke* against admitting parol evidence to contradict the terms of a deed is, that "it would be inconvenient that matters in writing, made on consideration, and which finally import the certain truth of the agreement of the parties, should be proved by the uncertain testimony of slippery memory:" *Countess of Rutland's case* (a); 2 Phil. Ev. 357. Here the letters and conversation taken together formed the contract. [*Alderson*, B.—Suppose a person wrote to another proposing to deal with him on six months' credit, and the latter by parol accepted the offer, and then the former wrote another letter simply ordering goods; it would be a question for the jury to say whether the order for the goods was not an order upon the previous terms.] The principle of the decision in *Eden v. Blake* (b) is applicable to this case. That was an action to recover 6*l.* 9*s.* 10*d.*, the price of a dressing-case sold by auction. In the printed catalogue the dressing-case was described as having silver fittings; but, previously to the sale of it, the auctioneer stated publicly from his box, and in the hearing of the defendant, that the catalogue was incorrect in stating the fittings of the dressing-case to be of silver, and that it would be sold as having plated fittings, but no alteration was made in the catalogue. Under these circumstances, it was held that parol evidence of the statement of the auctioneer was admissible, since the contract existed partly in the printed particulars and partly in the parol statement of the auctioneer. [*Parke*, B.—You say there would have been no contract within the Statute of Frauds unless there had been an acceptance of part of the goods, and that the plaintiffs could not have succeeded in an action for not receiving the goods, as the letter was not meant to be a memorandum of the agreement, but only an order for the goods.] Even assuming the contract to be

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(a) 5 Rep. 26.

(b) 13 M. & W. 614.

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contained in the letter, it would still be necessary to give parol evidence to explain it, for there is no statement of the time when the price is to be paid. If it be said that the law will imply payment within a reasonable time, parol evidence must nevertheless be given, in order to shew what is a reasonable time, with reference to the custom of the trade, or price of the goods. The judgment of *Parke, B.*, in *Hutton v. Warren* (a), shews the principle on which extrinsic evidence is admissible to annex incidents to written contracts, namely, a presumption that the parties did not mean to express in writing the whole of the contract by which they intended to be bound. The case of *Ford v. Yates* (b) does not apply; for there the whole terms of the contract were contained in the written agreement. *Bosanquet, J.*, in his judgment in that case, relies on *Greaves v. Ashlin* (c), as a decisive authority to shew that parol evidence cannot be received to vary terms which do appear on the face of the contract. In that case, however, the agreement imported a contract of absolute sale, which passed the property in the goods to the purchaser, and it was sought by parol evidence to shew that the sale was subject to a condition. So, also, in *Meres v. Ansell* (d), the parol evidence substantially altered the written agreement. The evidence in this case does not add to the contract any term which varies the previous stipulations. In *Ellis v. Thompson* (e), which was an action for not accepting goods, to which the defendant pleaded that the plaintiff was not ready to deliver them within a reasonable time, it was held that the parol representation of the broker, at the time of sale, that the goods were ready for shipment, was admissible in evidence. Lord Abinger says, "Suppose a man contracts to sell certain goods, and the parties agree that the goods shall be

(a) 1 M. & W. 466.

(b) 2 M. & G. 549; 2 Scott,
 N. R. 645.

(c) 3 Camp. 426.

(d) 3 Wils. 275.

(e) 3 M. & W. 445.

conveyed to London, and nothing be said about the time of delivery, would it not be essential to ascertain what the parties were contracting about, and whether anything was said at the time, and whether the reasonable time not being shewn by the contract itself, you could derive it from other sources?" [*Alderson, B.*—There the evidence was given merely for the purpose of shewing what the words "reasonable time" meant.

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O'Malley and *Couch*, in support of the rule.—The order and acceptance in writing of the goods constituted a complete contract, which could not be varied by parol evidence. [*Alderson, B.*—An acceptance in writing is different from an acceptance by parol; the act of receiving the goods may be consistent with an agreement which contained qualified terms.] The invoice, which was sent according to order, amounts to an acceptance in writing. [*Alderson, B.*—Suppose a person offers to sell goods to another upon certain terms, and the latter does not then agree, but afterwards writes, merely directing the goods to be sent, without mentioning any terms; must not the contract be considered as made upon the terms offered? Or suppose, in this case, instead of the previous statement deposed to by the witnesses, the plaintiff had written to the defendant, offering to sell him goods on the following terms, namely, six months' credit and three months bill, and that after the expiration of the three months, the defendant had sent a letter to the plaintiff, desiring him to send other goods, without mentioning any terms, and the plaintiff had then sent the invoice; would not the two letters constitute the contract? and if so, where is the difference between the plaintiff writing and speaking the terms?] Unless there is something on the face of the writing which leads to the inference that the parties contracted with reference to some previous terms, parol evidence must be altogether rejected. [*Parke, B.*—Where the parties agree that a particular instrument shall

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contain the terms of the contract, the rule clearly is, that parol evidence cannot be given to add to or diminish from those terms, though it may to annex incidents, such as the custom of trade, &c. Here, however, the letter of the 24th of December refers to some previous conversation with the plaintiff.] The letter plainly indicates that payment is to be made on delivery. *Ford v. Yates* (a) is a conclusive authority to that effect. [*Parke*, B.—That case is based upon the supposition that there was a memorandum entered into by the broker contracting for both parties, but it was not so. *Alderson*, B.—In that case there could have been no contract, for the memorandum only contained the name of the defendant's agent.] That decision proceeded on the ground that the legal construction of the memorandum was, that the goods were to be paid for on delivery. *Greaves v. Ashlin* (b) is also in point. So, in *Williams v. Jones* (c), where an attorney entered into a written agreement to take into partnership a person who had not at that time been admitted an attorney, and no period was expressly fixed for the commencement of the partnership, it was held, that the partnership commenced from the date of the agreement, and that parol evidence was properly admitted to shew that the person taken into partnership was not an attorney at the time the agreement was executed, though it could not be received to shew that the agreement was not to take effect until he should be duly admitted, since that would make the agreement different from what it purported to be, namely, an agreement for a present partnership. Where a contract for the purchase and sale of goods is silent as to price, the law will imply that the parties intended to sell and buy at a reasonable price: *Hoadly v. MacLaine* (d), *Acebal v. Levy* (e). This is not like the case of *Grant v. Maddox* (f), where the

(a) 2 M. & G. 549; 2 Scott,
 N. R. 645.

(b) 3 Campb. 428.

(c) 5 B. & C. 108.

(d) 4 M. & Scott, 340; 10
 Bing. 482.

(e) 10 Bing. 376.

(f) 15 M. & W. 737.

defendant, by contract in writing, having agreed with an actress to engage her for three years, and pay her a salary of £5, £6, and £7 per week in those years; it was held, that parol evidence was admissible to shew that, according to the uniform usage of the theatrical profession, the plaintiff was only to be paid during the theatrical season, that is, during such time as the theatre was open for performance. There the evidence did not alter the contract, but merely explained the meaning of the words used.

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PARKE, B.—The rule must be discharged. In deciding this particular case on the circumstances of the case itself, I think parol evidence was admissible to prove the previous conversation with the plaintiff. In order to render the defendant liable, there must be some evidence to take the case out of the Statute of Frauds. That liability arises from his receipt and acceptance of the goods; and if the plaintiff relied on that, the defendant would have been at liberty to shew upon what terms he accepted them, by going into evidence of the conversation which took place at the time the order was given, by which it appears that the contract was to pay at six months' credit, and by a bill at three months. But the plaintiff, instead of having recourse to the receipt and acceptance of the goods, puts in the original order, which, without further explanation by parol, would be an order for payment on delivery. If, then, the plaintiff, instead of giving further evidence to explain this order, says that the defendant, by accepting the invoice, which treats him as a purchaser, has had ample notice, and therefore there is an acceptance of the terms of the sale, it is competent for the defendant to shew that he received the goods on the understanding that he bought them by credit at six months, and bill at three months. The case of *Ford v. Yates* was disposed of on the supposition, which turned out to be erroneous, that the memorandum entered into by the broker was a binding memorandum under the Statute

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of Frauds. It was signed with the intention of being a memorandum of the contract of purchase and sale, and the Court began by treating it as a binding contract; and, on that supposition, I am by no means prepared to say that decision is wrong.

ALDERSON, B.—I am of the same opinion. In *Ford v. Yates*, the decision of the Court proceeded on the supposition that the written instrument complied with the terms of the Statute of Frauds. Under that statute, a contract to deliver goods, without mentioning a time for payment, means that the delivery and the payment shall be contemporaneous acts; and *Ford v. Yates* decided that in such case evidence was inadmissible to shew that it was not intended that the payment should be contemporaneous with the delivery of the goods. Here the difficulty is of a different nature. The documents in question are not a contract, but are writings out of which, with other things, a contract is to be made. The question, then, is, whether the defendant has not a right to adduce evidence, not to contradict the written instruments, but to shew the real contract, of which the paper contains only one of the terms. In order to do that, the defendant must resort to the previous conversation. It is like the case of an offer by letter, written by the plaintiff to the defendant, stating the terms on which the former proposes to sell certain goods; in answer to which the defendant writes a letter to the plaintiff, desiring him to send certain articles, but not specifying any terms. In such case, can it be doubted that the second letter would have reference to the terms contained in the first, and that the two letters would constitute the contract; and that when the plaintiff sent the goods, he would send them on the terms contained in his own letter? Here, instead of a previous letter written by the plaintiff, there is a conversation between him and the defendant. In holding this evidence admissible, we do not trench on any of the cases.

PLATT, B.—If the invoice had been signed by the defendant, there might have been some colour for the argument on behalf of the plaintiff, for then it might have been urged that, as the contract made no mention of the time of payment, it would be inferred that payment was to be made either on request or within a reasonable time after the bargain. The fallacy of the argument on the part of the plaintiff consists in treating the writings as a contract, when, in fact, they are merely acts done in pursuance of a contract. The letter of the 24th of December refers to some conversation, and unless that conversation be imported by way of evidence, it cannot be known when the payment was to be made, the documents being silent as to the time.

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Rule discharged.

MORLEY v. PINCOMBE.

Feb. 9.

TRESPASS, for breaking and entering the plaintiff's close, and taking twenty dead pigs, twenty cwt. of pork, and divers other articles. Pleas—first, not guilty “by statute;” and, secondly, leave and license.

At the trial, before *Wilde*, C. J., at the last Devon Summer Assizes, it appeared that the articles in question were seized by the defendant as a distress for rent. The defendant, under the direction of the learned judge, had a verdict.

Commodities which cannot be restored upon a replevin in the same plight and condition as that in which they were when taken, are not distrainable for rent at common law; and therefore the flesh of animals lately slaughtered cannot be distrained.

Crowder obtained a rule nisi for a new trial, on the ground of the verdict being against evidence, and also for misdirection.

Kinglake and *Fitzherbert* now shewed cause, and con-

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tended that the evidence was in the defendant's favour. [Parke, B.—Assuming the first question to be decided in the defendant's favour, the remaining point must be found for the plaintiff; for how can commodities of a perishable nature, and which cannot be restored in the same state as that in which they were taken, be made the subject of distress. The common law is not taken away by the statute of 2 Will. & M. c. 5. Rolfe, B.—The rule is plain, you cannot distrain commodities which are liable to perish within a reasonable time after they have been taken. Parke, B.—It was said by Lord Chief Justice Willes, in *Simpson v. Hartop* (a), that “cocks and sheaves of corn were not distrainable before the statute 2 Will. & M. c. 5, (which was made in favour of landlords), because they could not be restored again in the same plight and condition that they were before upon a replevin, but must necessarily be damaged by being removed.” Alderson, B., referred to 1 Roll. Abr. 666. The rule is plain: what is true of corn, is true of the flesh of pigs.]

Crowder and *Montagu Smith*, in support of the rule, were not called upon.

PER CURIAM (b),

Rule absolute.

(a) Willes, 515.

(b) Parke, B., Alderson, B., Rolfe, B., and Platt, B.

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LLOYD v. DAVIES.

Feb. 11.

THE first count of the declaration in case was for an excessive distress; the second count was in trover. Plea, not guilty "by statute."

A tenant by elegit has a right to distrain without attornment.

At the trial, before *Cresswell*, J., at the last Cardigan Summer Assizes, the plaintiff, in order to shew his right to distrain, put in an elegit, but did not prove that the defendant had attorned to him. It was thereupon contended that the defendant had no right to distrain without attornment, and of that opinion was the learned judge, and the plaintiff had a verdict.

Lush, in Michaelmas Term last, moved for a rule calling on the plaintiff to shew cause why there should not be a new trial on the ground of misdirection.—There was no need of attornment. In *Rogers v. Pitcher* (a), *Gibbs*, C. J., says: "If the land had been in the possession of the former owner, the sheriff might have delivered actual possession: where it is in the possession of a tenant, the sheriff sets it out by metes and bounds, and the tenant is bound thenceforth to pay rent for his moiety to the tenant by elegit. This is a case in which attornment was not necessary before the Statute of Attornments, because tenant by elegit was in by judgment of law, to whom attornment was not necessary." In *Perkins* (b) it is said: "But in cases of grants of reversions, there ought to be attornments; otherwise they shall not pass, if the grant be not by matter of record," &c. The statute of 4 Anne, c. 16, only applies to the acts of the parties. [He also referred to Co. Litt. ss. 584, 585.]

The Court granted a rule nisi; against which

(a) 6 Taunt. 207.

(b) Sect. 114.

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Evans (*Bramwell* with him) now shewed cause.—The defendant had no right to distrain without attornment. *Harris v. Booker* (a) is not a decision upon the point; but *Best*, C. J., there says, in delivering the judgment of the Court, "We do not agree that an attornment would have been unnecessary, supposing the plaintiff had been in a situation to call for it. * * * * In the present cause the property is claimed under a judgment; and even if the tenant by elegit had a right to enter, we think he could not have proceeded for rent without an attornment." [*Parke*, B.—There are three authorities in the Year Books against you, cited in Roll. Abr., tit. "Attornment," (F), 37 Hen. 6, 33; 39 Hen. 6, 24; 20 Hen. 6, 7, 6. They settle this point, and decide that attornment is not necessary; where the reversion was assigned by operation of law it was not requisite, but it was when assigned by the act of the parties. If a party gets the reversion, he is entitled to the rent which is attached to it. *Rolfe*, B., referred to Roll. Abr., tit. "Execution (B);" *Sir Thomas Cambell's case*. *Parke*, B.—There is also *The Bishop of Bristol's case* (b). The question is clear upon the authorities.]

Watson, contra, was not called upon.

PER CURIAM (c).—The rule must be

Absolute.

(a) 4 Bing. 96.
 (b) 3 Leon. 113.

(c) *Parke*, B., *Alderson*, B.,
Rolfe, B., and *Platt*, B.

1848.

YOUNG and Another, Assignees of NORTLETT, a Bankrupt, Feb. 10.
v. HOPE and Another.

TROVER, by the assignees of a bankrupt, for certain goods, chattels, and effects. The declaration contained a count on the possession of the bankrupt, and another on the possession of the assignees. Pleas, not guilty and not possessed.

At the trial, before the *Lord Chief Baron*, at the York Summer Assizes, 1847, it appeared that the goods in question, which consisted of shop fixtures and materials of trade, belonged to the defendant, and that one *Nortlett* came into possession of them under an agreement that he should keep possession for a twelvemonth, upon payment of a certain sum, but if he failed to pay the money on the 16th May, 1847, the defendant should be at liberty to retake the goods. *Nortlett* continued in possession of the goods, treating them as his own, until the 16th May, 1847, when the money not having been paid, the defendant, on the following day, sold them. On the 24th May, a fiat issued against *Nortlett*, on an act of bankruptcy committed on the 14th of May. It was submitted that the plaintiffs were entitled to recover, inasmuch as the goods were in the "order and disposition" of the bankrupt, within the 72nd section of the 6 Geo. 4, c. 16. On the part of the defendant, it was contended, that this was a "transaction" protected by the 2 & 3 Vict. c. 29, s. 1. The learned judge was of opinion, that the agreement was a fraud on the creditors, and directed a verdict for the plaintiffs, reserving leave for the defendant to move to enter a verdict for him.

A trader took possession of goods under an agreement with the owner that he should keep possession for a twelvemonth, on payment of a certain sum, but if the money was not paid on a certain day, the owner should be at liberty to retake them. The goods continued in the possession of the trader until the stipulated time for payment, when the money not having been paid, the owner sold them, after an act of bankruptcy committed by the trader, but before the fiat issued:—*Held*, that this was a "transaction" protected by the 2 & 3 Vict. c. 29, s. 1.

A rule nisi having been obtained accordingly,

H. Hill shewed cause.—The question is, whether the 72nd section of the 6 Geo. 4, c. 16, relating to goods in the

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order and disposition of bankrupts, is affected by the 2 & 3 Vict. c. 29, s. 1. The latter statute enacts, "that all contracts, dealings, and transactions, by and with any bankrupt, really and bonâ fide entered into before the date and issuing of the fiat, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed." It will be argued on the other side, that the effect of that enactment is, to do away with the relation to the act of bankruptcy, and to substitute the issuing of the fiat for the act of bankruptcy, in all cases in which the party had not notice of the act of bankruptcy. Such construction, however, cannot be supported. The case of *Fawcett v. Fearne* (a) shews that the words in the 6 Geo. 4, c. 16, s. 72, "at the time he becomes bankrupt," mean, at the time of the committing of the act of bankruptcy, and not the time when the fiat issued, the statute of Victoria having made no alteration in this respect. In *Load v. Green* (b), *Parke, B.*, in delivering judgment, says: "To come within the 72nd section of the 6 Geo. 4, c. 16, the goods must have been in the bankrupt's possession "at the time he became bankrupt; that is, at the time of the act of bankruptcy." [*Parke, B.*—No doubt that section must be construed so as to give the assignees all the property of which the bankrupt was the apparent owner at the time of the act of bankruptcy; but prior to the statute of Victoria, if the real owner had retaken possession of his goods before the act of bankruptcy, he would have been entitled to them in law. The question then is, whether the statute of Victoria does not give the same right, if he retakes them before the issuing of the fiat.] The object of that statute was, to protect parties having bonâ fide dealings with the bankrupt, touching his property, or concerning payments made by or to him; but the statute was not intended to aid persons who entrusted their goods to a trader, in order to enable him to obtain a false credit. The

(a) 6 Q. B. 20.

(b) 15 M. & W. 216.

true meaning of the statute appears from the preamble, which recites the 82nd section of the 6 Geo. 4, c. 16, relating to payments made by and to bankrupts without notice; but it makes no mention of the 81st section, relating to conveyances, contracts, and other dealings and transactions by and with bankrupts. [*Parke, B.*—It was clearly meant to alter the 81st section; and the omission to mention it shews how imperfect the recital is.] *In re Styan (a)* was the case of a deposit of a policy of assurance, by way of security for a debt, made previously to the commission of an act of bankruptcy by the depositor, and notified to the insurance company by the party with whom the deposit was made previously to the issuing of the fiat, though subsequently to the act of bankruptcy; and such transaction was held valid as against the assignees under the 2 & 3 Vict. c. 29, it not appearing that at the time the notice was given the party giving it was aware of an act of bankruptcy committed. But there the bankrupt was dealing with his own property, not property entrusted to him. The statute of Victoria has no application to a transaction entered into prior to the act of bankruptcy, and in which the goods were retaken after the act of bankruptcy. The case of *Wright v. Fearnley (b)*, which was affirmed on error in the Exchequer Chamber (*c*), explains the meaning of the word “transaction.” There the bankrupt had within two months before the fiat deposited chattels by way of pledge, in consideration of an advance of money; and it was held, that the transaction, though *bonâ fide* and without notice of the act of bankruptcy, was not protected by the 82nd section of the 6 Geo. 4, c. 16. [*Parke, B.*—All that the Court there decided, was, that a pledge of goods was not a payment within that section. In the case of *Pariente v. Pennell (d)*, *Tindal, C. J.*, ruled, that goods suffered by the true owner to remain in the possession of a

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(a) 1 Phil. 105.

(b) 5 Bing. N. C. 89.

(c) 6 Bing. N. C. 446.

(d) 2 Moo. & Rob. 516.

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trader till after a secret act of bankruptcy, but taken possession of before the fiat, do not, since the statute of Victoria, pass to the assignees.] In that case the jury found that the plaintiff had notice of an act of bankruptcy, and a verdict was given for the assignees, so that there was no opportunity of questioning the ruling of the learned judge.

Knowles appeared to argue in support of the rule, but was not called upon.

PARKE, B.—The rule must be absolute. The question depends upon the true construction of the statute 2 & 3 Vict. c. 29, s. 1. Mr. *Hill* says, that it must be confined to cases in which the bankrupt transfers the right of property in his own goods. I cannot collect, from any expression in the preamble of the statute, that such construction is to be put upon it. After reciting the 6 Geo. 4, c. 16, and the 2 Vict. c. 11, it thus proceeds: “whereas it is expedient that further protection should be given to persons *dealing with bankrupts* before the issuing of any fiat against them.” The object of the enactment was, to do away with the rule of relation to the act of bankruptcy, which was considered to work great injustice; and I see no reason why, if it were intended to prevent such rule of relation in the transfer of the bankrupt’s property, it should not also apply to the case of a bankrupt dealing with the property of others. If the contract had been, that, for an antecedent consideration, the bankrupt would, on the 16th of March, deliver up certain property of him the bankrupt, and if he failed to do so, the party should be at liberty to take possession of the property; and if afterwards, in pursuance of that agreement, the party took possession, I cannot understand why that transaction should be protected, and the transaction of a bankrupt returning another person’s goods should not also be protected. In the absence of authority, I should have thought that the latter case would clearly fall within the description of a

"transaction by and with the bankrupt" before the date and issuing of the fiat. There are, however, two authorities, one of which, a decision of Lord Chancellor *Lyndhurst*, "In the Matter of *Styan*," seems to me expressly in point. There a policy of insurance had been deposited as security for a debt; but the creditor omitted to give notice to the insurance company, before the commission of an act of bankruptcy by the depositor, the effect of which was, to leave the policy in the situation of goods in the apparent ownership of the bankrupt: but the creditor having given notice before the issuing of the fiat, and having no knowledge that an act of bankruptcy had been committed, the Lord Chancellor thought the transaction protected by the 2 & 3 Vict. c. 29. Besides that case, there is the opinion of *Tindal*, C. J., in the case of *Pariente v. Pennell* (a). It is true that an opinion expressed at *Nisi Prius* is not entitled to the same weight as if expressed after solemn argument, but the opinion is one which does not require authority to support it. Upon the true construction of the act, and according to strict justice, this transaction ought to be protected.

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ALDERSON, B.—I am of the same opinion. This is a "transaction" which takes place between the time of the committing of the act of bankruptcy, and the issuing of the fiat. The act of Parliament makes valid all such transactions, provided the party dealing with the bankrupt had no notice at the time of an act of bankruptcy. As to those matters, the act of bankruptcy and the issuing of the fiat are to be taken as one and the same day. In the case of *Fawcett v. Fearne* (b), the goods came into the possession of the bankrupt for the first time after the act of bankruptcy and before the fiat; and it was argued that the case was not within the clause of the statute which makes goods in the possession of the bankrupt as reputed owner

(a) 2 Moo. & Rob. 516.

(b) 6 Q. B. 20.

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“at the time he becomes bankrupt” subject to the disposition of his assignees. That case is relied upon as an authority to shew that the 6 Geo. 4, c. 16, s. 72, is not altered by the 2 & 3 Vict. c. 29, s. 1; but the answer is, that the latter statute has no relation to such matters, inasmuch as it only renders valid particular transactions before invalidated by the rule of relation to the act of bankruptcy. In truth the present point was not decided in that case. Here the goods were in the order and disposition of the bankrupt at the time of the committing of the act of bankruptcy; and if the true owner had not retaken possession of them, might have been disposed of by the assignees.

ROLFE, B.—I am of the same opinion. The expression in the statute is, “all contracts, dealings, and *transactions* by and with any bankrupt.” Here the transaction is this—that, before the committing of the act of bankruptcy, certain goods are deposited with the bankrupt, upon terms enabling him to keep possession of them for a year upon payment of a certain sum; and enabling the owner to resume possession in case the money was not paid at the stipulated time. The owner takes possession after the act of bankruptcy, and before the issuing of the fiat. Such a case seems to me to come within the express terms of the act of Parliament. Was it not a “dealing,” was it not a “transaction” with the bankrupt? It was evidently so. Without authority I should have thought it a clear case, and I am not able to distinguish it from *In re Styan*.

PLATT, B.—It is clearly a “dealing” or “transaction” with the bankrupt before the issuing of the fiat.

Rule absolute.

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Feb. 18.

ASSUMPSIT for goods sold and delivered, and goods bargained and sold. Plea, non assumpsit.

At the trial, before *Wightman*, J., at the Liverpool Summer Assizes, 1847, it appeared that the action was brought to recover 222*l.* 1*s.* 2*d.*, being the price of five bales of La Guayra tobacco, sold by the plaintiff to the defendant under the following circumstances:—The plaintiff was a general merchant at Liverpool, and engaged in the La Guayra trade; the defendants were cigar manufacturers in London. On the 19th of August, 1846, one Samuelson, of Liverpool, a tobacco broker, who had occasionally been employed both by plaintiff and defendants in the sale of tobacco, forwarded to the defendants six samples of fifty-one bales of tobacco then in bond, and which the plaintiff was desirous of selling. Samuelson represented that the bulk was equal to the sample. Some correspondence afterwards took place between the defendants and Samuelson as to the quality and price of the tobacco; and on the 14th of September, Samuelson being in London, concluded the bargain with the defendants, when bought and sold notes agreeing with each other were delivered to the plaintiff and defendants. The following is the form of the sold note:—

In an action for the price of tobacco sold, evidence is admissible to show that by the established usage of the tobacco trade, all sales are by sample, although not so expressed in the bought and sold notes.

“Messrs. E. Jonas and Brothers, London.

“Liverpool, September 14, 1846.

“I HAVE this day sold you on account Mr. W. H. L. Syers, fifty-one bales tobacco ex Lucretia, La Guayra, at 1*l.* 1*d.* per lb. in bond: customary allowances: payment two and two months.

“EDWARD SAMUELSON.”

The defendants' case was, first, that Samuelson was appointed with limited authority to buy by sample only, and that the defendants were not bound by the contract:

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secondly, that the bulk did not correspond with the sample; and evidence was tendered to shew that by the universal usage of the trade, a sale of tobacco was understood to be by sample. The learned judge offered to leave the first question to the jury, which was declined by the defendants' counsel; and as to the other point, he ruled that the evidence was inadmissible, inasmuch as it varied the written contract, which was contained in the bought and sold notes; and under his lordship's direction a verdict was found for the plaintiff.

A rule nisi having been obtained to set aside the verdict, and for a new trial, on the ground of misdirection and the rejection of evidence,

Tomlinson shewed cause, (February 10).—As to the objection that the broker had no authority to buy otherwise than by sample, and consequently the defendant was not bound by the contract, it is a sufficient answer that the learned judge offered to leave the question to the jury.

The only point then is, whether evidence was admissible of the general custom in the tobacco trade, that all sales were understood to be by sample, though not so mentioned in the contract. It is submitted that no evidence can be given for the purpose of controlling or varying the specific contract entered into. In the case of *Meyer v. Everth* (a), Lord *Ellenborough* ruled, that where, upon a sale of goods, the seller produces a sample, and represents that the bulk is of equal quality, if there be a sale note which does not refer to the sample, this is not a sale by sample; and if the goods turn out to be of inferior quality, the purchaser's remedy is by an action on the case for a deceitful representation. This point was much discussed in the case of *Trueman v. Loder* (b). There, evidence was offered by a defendant of a custom in the tallow trade, that on contracts

(a) 4 Camph. 22.

(b) 11 A. & E. 589.

for the sale of tallow, a party might reject the undisclosed principal, and look to the broker for the completion of the contract; and such evidence was held inadmissible as varying a written instrument. Lord *Denman*, C. J., in delivering the judgment of the Court says, "Custom of trade has been supposed to form a virtual exception to this well-known rule; but the cases go no further than to permit the explanation of words used in a sense different from their ordinary meaning, or the addition of known terms not inconsistent with the written contract." This custom of trade, which amounts to an implied warranty, cannot be annexed to an absolute contract, so as to control its provisions.

The Court called on,

Watson (with whom was *Hoggins*) to support the rule.—The usage of trade sought to be proved does not annex any additional term to the contract, but only explains its meaning. It is no variance to say, that, according to the usage of trade, all contracts of this kind are subject to a condition, that the bulk shall correspond with the sample. The evidence of this usage is equally admissible as a custom for a way-going crop in the case of a lease. It adds no new term inconsistent with the contract. In the case of *Bayliffe v. Butterworth* (a), evidence was admitted of a usage on the Stock Exchange at Liverpool for brokers to be answerable to each other for engagements entered into between them for third parties. In *Hutton v. Warren* (b), where the question was, whether a custom of the country was excluded by a stipulation in a lease, *Parke*, B., in delivering the judgment of the Court, says, "It has been long settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent. The same rule has also been applied to contracts

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(a) Ante, p. 425.

(b) 1 M. & W. 466.

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in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption, that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages." Evidence may be given to shew the meaning of the term "a month" in commercial transactions, that term not meaning the same period in law. This mercantile instrument must be construed with reference to the usage of trade, which annexes this condition as incident to every contract for the sale of tobacco. *Trueman v. Loder* (a) was decided on the ground, that the defendant was sufficiently proved to be the vendor of the tallow, and that evidence of custom for the purpose of shifting his liability was inadmissible. [Parke, B.—In *Parker v. Palmer* (b), the words "by sample" are said to mean a mere collateral engagement, on the part of the seller, that the commodity shall be of a particular quality. If they merely amount to a warranty, and not a condition of sale, there would be nothing inconsistent with the contract in admitting evidence of the usage.] In *Hodgson v. Davis* (c), evidence was given of the usage of trade in the city of London, that a person who sells goods by a broker reserves to himself the power of ratifying or rejecting the contract, as he shall be satisfied with the credit of the purchaser. In *Dickinson v. Lehall* (d), there was proof of a usage in the Irish provision trade, that a general authority to a broker to sell expires with the day on which it was given; and that a contract for the sale of goods afterwards entered into by the broker is not binding on the principal. In *Whittaker v. Mason* (e), which was an action for breach of contract, in not paying for books sold and delivered, by

(a) 11 A. & E. 589.

(d) 4 Camp. 279.

(b) 4 B. & Ald. 387.

(e) 2 Bing. N. C. 359.

(c) 2 Camp. 530.

bills at certain dates, with security for their being honoured, the defendant pleaded a custom in London, that upon such sales the security need not be given, unless required, when the books are delivered; and that the plaintiff did not require it at that time. On demurrer to the replication, the plea was held good. *Tindal*, C. J., there says, "The objection taken to the plea is, that the defendant cannot by law vary the terms of a written contract by the introduction of the custom and usage of trade; and that as he would be precluded from shewing such custom or usage in evidence, he is equally prevented from pleading the same in bar of the action. How far a mercantile contract, reduced to writing, and signed by the parties, which is silent on a particular point, may have that silence supplied by evidence of a general course and usage of trade, within the limits of which the contract was made, and to which it relates, is a question which it would be difficult to answer with exactness and precision." Here the authority given by the defendant to the broker was to enter into the contract according to the usage of trade; and, as the bulk did not correspond with the sample, the defendant was not bound to receive the goods: *Lorymer v. Smith* (a). The condition of sale not having been complied with, the property in the commodity did not pass to the defendant: *Laidler v. Burlinson* (b), *Clarke v. Spence* (c). To an action for not accepting the tobacco, it would have been a good defence that the bulk did not correspond with the sample.

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Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—In this case a motion was made for a new trial, and a rule nisi having been granted, the argument

(a) 1 B. & C. 1. (b) 2 M. & W. 602. (c) 4 A. & E. 448.

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took place a few days ago. It was an action for tobacco sold and delivered, and goods bargained and sold, to which there was a plea of the general issue. It appeared on the trial, before my brother *Wightman*, that the contract for the purchase of the tobacco, which was in bond in Liverpool, was made through the medium of a broker at Liverpool, who, having authority from both parties, received and transmitted samples to the defendant; and, having made the contract, gave the usual bought note to the defendant, and sale note to the plaintiff. Both notes agreed. The contract was [His Lordship read the bought note]. The tobacco was delivered to the carrier at Liverpool for the defendant, and carried to London and placed in bond. Mr. *Watson*, for the defendant, made two points:—First, that the broker was appointed with limited authority to buy by sample only, and that the defendant was not bound by the contract.

It appears, however, that the learned judge offered to submit this part of the case to the jury upon the evidence, and the objection cannot now avail.

The other and more material point was this:—He offered evidence of the universal usage, that on a sale of tobacco, it was understood to be by sample, though not mentioned to be so in the contract; and the question is, whether such evidence was admissible? There is no doubt that in mercantile transactions, and others of ordinary occurrence, evidence of established usage is admissible, not merely to explain the terms used, but to annex customary incidents. In the case of *Hutton v. Warren* (a), the law on this subject was laid down fully, and the limitations pointed out. Such usage is admissible when it is not expressly or impliedly excluded by the tenor of the written instrument. The question then is, whether by implication that usage is excluded in this case? For the purposes of the argument, it

(a) 1 M. & W. 466.

must be assumed, that in the tobacco trade, whenever a sale of tobacco took place, and the bought note was silent on that subject, and when samples were delivered, it was the prevailing usage that the vendor was understood to agree that the bulk should correspond with them. This undoubtedly amounts to a parol warranty or agreement that the bulk should correspond with the sample. If the goods have not been delivered, or the property has not passed by the bargain, (a question depending upon the terms of the bargain for a specific chattel), this agreement authorises the purchaser to refuse to receive the article sold, or complete the bargain. If he does receive it, or the property does pass, he may sue on the agreement, or give it in evidence in mitigation of damages, according to the authority of *Street v. Blay* (a). Now, the offer in this case was to prove an usage annexing an additional term to the contract not inconsistent with it, unless, indeed, the term "customary allowances" excludes this additional term on the principle of "expressio unius est exclusio alterius." But it seems to us that this expression was used for a different purpose, alluding probably to some compensation for trifling damages, and that it has not the effect of excluding evidence of an implied agreement of correspondence with the sample.

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(a) 2 B. & Adol. 456.

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Feb. 5. THE NEWRY AND ENNISKILLEN RAILWAY COMPANY *v.*
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Under the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16) a resolution by directors to make "a call" need not specify either the time or place for payment, but the directors must appoint a time and place, which must be notified to the shareholder by a notice allowing twenty-one days for payment. A purchaser of scrip certificates for shares in a railway company is not liable for calls until his name is entered on the *sealed* register of shares. Whether an original allottee would in such case be liable, *quære*.

DEBT under the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, s. 26, to recover the amount of two calls on fifty shares in the Newry and Enniskillen Railway Company.

The defendant pleaded never indebted, and also pleading that the defendant was the holder of the shares, and that the calls were made.—Upon which issues were joined.

At the trial before Lord *Denman*, C. J., at the Surrey Spring Assizes, 1847, the following facts appeared:—The company was incorporated by the 8 & 9 Vict. c. cxxix, and the first general meeting was held on the 20th August, 1845. The defendant was not an original allottee of the shares in question, but had purchased in the market the scrip certificates, which in September, 1845, and before either of the calls were made, he sent to the company, and claimed to be entered in their books as the proprietor of such shares. His name was, thereupon, entered on a *draft* register of shares, and a receipt for the scrip sent to his agent. From this draft "the alphabetical numerical and sealed register of the company" was made up, and the corporate seal affixed to it on the 27th of February, 1846, at the second meeting of the directors, and after the making of the first of the calls for which this action was brought. On the 22nd of June, 1846, there was a meeting of the directors, at which it was resolved, that the second call be made, and "that one month's notice be given;" but the resolution contained no time or place for payment. On the 28th of June, the following notice was sent to the defendant, signed by the secretary of the company:—

"Sir,—The directors of the Newry and Enniskillen Rail-

way Company having made a call of 2*l.* 10*s.* per share, payable on or before the 8th of August next, you are requested to pay the sum of £125, being the amount payable, in respect of such call, of the shares held by you in this company, to any of the undermentioned bankers," (then followed the names of several bankers). "The bankers have instructions to charge interest at the rate of £5 per cent. per annum on all sums which shall be tendered after the said 8th day of August next."

On the part of the defendant, it was objected, that the company could not recover the first call, since, at the time it was made, the defendant's name was not on the sealed register of shareholders; that the second call was insufficient, inasmuch as the resolution did not state the time and place of payment. The learned judge directed a verdict for the plaintiff for the amount of the calls, reserving leave for the defendant to move to enter a verdict for him.

Bramwell moved, in Easter Term (April 23rd).—The second call was insufficient, and the notice was defective for want of a proper call; so that the two together are not a compliance with the requisites of the 8 & 9 Vict. c. 16. The 21st section of that statute enacts, "that the several persons who have subscribed any money towards the undertaking, or their legal representatives respectively, shall pay the sums respectively so subscribed, or such portions thereof as shall from time to time be called for by the company, at such *times* and *places* as shall be appointed by the company." The following section, after providing for twenty-one days' notice, enacts, "that every shareholder shall be liable to pay the amount of the calls so made in respect of the shares held by him, to the persons and at the times and places from time to time appointed by the company." The expression "on the day appointed for payment" is also found in the 23rd section, which requires interest to be paid on "calls" unpaid. By the 25th section,

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“if, at the time appointed by the company for the payment of any call, any shareholder shall fail to pay the amount of such call, it shall be lawful for the company to sue such shareholder,” &c. If the 22nd section had not contained any provision as to notice, it is evident that the resolution of a call must have appointed a time and place for payment. It will, perhaps, be said, that the provision as to twenty-one days’ notice shews, that “a time appointed by the company” must be the time appointed by that notice; for as the notice might be given after the day appointed by the resolution, and as the shareholder could not be sued until twenty-one days after notice, the time appointed for payment must be a time after twenty-one days’ notice. That, however, is not the true construction; the meaning of the enactment is, that no action shall be brought unless notice be given. [*Parke, B.*—In a case of the *Great North of England Railway v. Biddulph* (a), this Court held that the resolution need not specify the place for payment.] The object of the 23rd and 25th sections were not to give the company a right of action, but to make the shareholder liable to interest, if he failed, after notice, to pay on the day appointed. [*Parke, B.*—Does the word “call” mean anything more than a call for money; and is not a call for money an application for money? If so, the Legislature says, that there shall be an application for money to each subscriber. Your argument is, not that the company shall do it uniformly, but that it is a condition precedent that they shall.] The 26th section uses the word “call” in a different sense, and as meaning the amount to be paid. When the call is made, a certain day must be appointed for payment; and before a shareholder can be sued, twenty-one days’ notice must be given. The act of Parliament becomes consistent if read in this way,—make a general call, give a time and place for payment, and also twenty-

(a) 7 M. & W. 243.

one days' notice, and then you may maintain an action. If the twenty-one days' notice be given prior to the time appointed for payment by the resolution making the call, then you are entitled to interest.

He then argued that the defendant was not liable to the first call, as his name was not on the sealed register at the time that call was made.

POLLOCK, C. B.—The Court think you are entitled to a rule on that point. With respect to the other objection, it appears to me that there is no foundation for it.

PARKE, B.—I am of the same opinion. It is clear that the word "call" is used in the act in two different senses. In one part it means, the applications to the shareholders to pay; and in another, the amount to be paid. The sections which empower the company to make calls contain no *express* direction that the same application shall be made to each individual for the same portion of the sum originally subscribed. Probably the directors may be under an objection to do so, but I am certainly of opinion that it is not a condition precedent to their right to recover the amount of the call. If it were so held, the affairs of these companies would be in the greatest confusion; for suppose a notice by accident mislaid, the consequence would be, that the shareholder for whom it was intended would not be bound to pay his call, and those who had already paid on individual notices, and who might be supposed to have paid on the faith that the call was made on each equally, would have a right to claim from the directors the money they had paid, on the ground that it was paid under a mistake of the facts. That construction would be fraught with such evil consequences, that I think it impossible, (putting a reasonable interpretation on the act of Parliament), to say that the Legislature intended that what they have not expressly declared, but which is only implied, should amount to a condition precedent. I

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am therefore of opinion, that it is not a condition precedent that each party should have notice to pay the amount of his call at the same time and place. It follows that the resolution to make a call need not specify either the time or place for payment; but the directors must appoint a time and place, which must be notified to the shareholder by a notice, allowing him twenty-one days for the purpose of payment. The case of the *Great North of England Railway v. Biddulph* (a) proves, that the resolution need not contain the place of payment; and I think that by implication it also proves, that it need not contain the time of payment. The resolution is nothing more than a determination, that thereafter "a call" shall be made, that is, that an application shall be made to each shareholder for a proportion of his share; and it is enough if the directors appoint a time or place, either by public advertisement, (where such a mode is allowed by the private act), as in the case referred to, or under the general act, by an individual notice to each shareholder: consequently that objection cannot prevail.

PLATT, B., concurred.

Rule refused as to that point; granted on the other.

Shee, Serjt., *Petersdorff*, and *E. James* now shewed cause.—The defendant was liable as a proprietor, although the register upon which his name appears was not sealed. The case of the *Cheltenham and Great Western Union Railway Company v. Price* (b) will probably be relied upon by the other side. There the act incorporating the company (6 Will. 4, c. 77) enacted, that, in an action for calls, the book of shares, under the seal of the company, should be primâ facie evidence that a party was proprietor of shares. It appeared that a call was made in October, 1836, and that

(a) 7 M. & W. 243.

(b) 9 C. & P. 55.

the book of shares, which contained the name of the defendant as a shareholder, was made up before the end of September, 1836, from claims sent in by different parties, but the seal was not affixed to it till November, 1836. Under those circumstances, Lord *Denman* ruled that this book was no evidence that the defendant was a proprietor of shares at the time of the call in October, 1836. Here, however, there is other evidence to show that the defendant was a shareholder, for he by letter declared himself the owner of fifty shares, and claimed to have his name entered on the register as such owner. The sealing of the register is not essential to constitute a shareholder, but is merely a mode of authenticating the draft register; and the fact of proprietorship may be proved by evidence aliunde. By the 6th section of the local act, 8 & 9 Vict. c. cxxix, the company are authorised "to make on the shareholders" calls to a certain limited amount; and the defendant was "a shareholder" within the meaning of that section. The 8th section of the 8 & 9 Vict. c. 16, declares, that "every person who shall have subscribed the prescribed sum, or upwards, to the capital of the company, or shall otherwise have become entitled to a share in the company, and whose name shall have been entered on the register of shareholders hereinafter mentioned, shall be deemed a shareholder of the company." Although the defendant may not be a subscriber within the meaning of that section, he is at all events a person who has "otherwise become entitled to a share in the company." The 9th section enacts, that "the company shall keep a book to be called 'The Register of Shareholders;' and in such book shall be fairly and distinctly entered, from time to time, the names of the several corporations, and the names and additions of the several persons entitled to shares in the company, together with the number of shares to which such shareholders shall be respectively entitled, distinguishing each share by its number, and the amount of the subscriptions paid on such shares, and the surnames and corporate names of the said shareholders shall be placed in

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alphabetical order; and such book shall be authenticated by the common seal of the company being affixed thereto; and such authentication shall take place at the first ordinary meeting or at the next subsequent meeting of the company, and so, from time to time, at each ordinary meeting of the company." No mention is made in that section of the effect of authentication, or what is the effect of the registry if no authentication takes place. But the 28th section enacts, that "the production of the register of shareholders shall be *primâ facie* evidence of such defendant being a shareholder, and of the number and amount of his shares." Those provisions are for the protection of the company, not for the benefit of shareholders reluctant to pay their calls. The 18th and 33rd sections shew, that proprietorship is contemplated as capable of existing, although there is no sealed register. The former section enacts, that, "if the interest in any share have become transmitted in consequence of the death, or bankruptcy, or insolvency of any shareholder, or in consequence of the marriage of a female shareholder, or by any other lawful means than by a transfer according to the provisions of this or the special act, such transmission shall be authenticated by a declaration in writing, as hereinafter mentioned, or in such other manner as the directors shall require; and every such declaration shall state the manner in which, and the party to whom, such share shall have been so transmitted, and shall be made and signed by some credible person, before a justice, or before a master or master extraordinary of the High Court of Chancery; and such declaration shall be left with the secretary, and thereupon he shall enter the name of the person entitled, under such transmission, in the register of shareholders; and for every such entry the company may demand any sum not exceeding the prescribed amount; and where no amount shall be prescribed, then not exceeding five shillings; and, until such transmission has been so authenticated, no person claiming, by virtue of any such transmission, shall be entitled to receive any share of the profits

of the undertaking, nor to vote in respect of any such share as the holder thereof." Therefore, a person in whom shares had become vested by transmission would, if he had complied with the provisions of that section, enjoy all the rights of a shareholder upon the mere entry of his name on the register, which need not be sealed until the next general meeting of the company. Again, by the 33rd section, a sealed register is not considered essential to the proprietorship of shares. That section enacts, that "a declaration in writing, by some credible person not interested in the matter, made before any justice, or before any master or master extraordinary of the High Court of Chancery, that the call in respect of a share was made, and notice thereof given, and that default in payment of the call was made, and that the forfeiture of the share was declared and confirmed in manner thereinbefore required, shall be sufficient evidence of the facts therein stated; and such declaration, and the receipt of the treasurer of the company for the price of such share, shall constitute a good title to such share, and a certificate of proprietorship shall be delivered to such purchaser, and therefore he shall be deemed the holder of such share, discharged from all calls due prior to such purchase; and he shall not be bound to see to the application of the purchase-money, nor shall his title to such share be affected by any irregularity in the proceedings in reference to such sale." A new proprietor has no means of compelling the company to affix their seal to the register, and it would be hard if his privileges or liabilities depended on their so doing. [*Parke, B.*—The 8th section of the 8 & 9 Vict. c. 16, says, that "every person who shall have subscribed the prescribed sum, &c., or shall otherwise have become entitled to a share in the company, *and* (not or) whose name shall have been entered on the register of shareholders, shall be deemed a shareholder."'] That is, in order to exercise the rights of a shareholder. The 27th section says, that in an action for calls, it shall be sufficient to prove that the

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defendant was a shareholder at the time the call was made; and the 28th section makes the production of the register primâ evidence of that fact. It is not open to the defendant to say that his name is not on the register, if the company prove, in point of fact, that he is a shareholder. The interpretation clause, section 3, declares that the word "shareholder" shall mean "shareholder, proprietor, or member of the company," not a person whose name is on the register. [*Platt, B.*—The 8th section should be read as if the words "shareholder, proprietor, or member of the company" were introduced into it.]

Montagu Chambers and *Bramwell* appeared to support the rule, but were not called upon.

PARKE, B.—The rule must be absolute. These companies appear perfectly satisfied as soon as they have obtained their acts of Parliament, and never trouble themselves to look into the clauses and see what is required to be done by them. By the 8th section of the general act, all persons who have subscribed to the company, or have otherwise become entitled to share in it, are to be deemed shareholders, which the interpretation clause explains to mean "shareholders, proprietors, or members of the company." Then, by the 9th section, the company are required to enter in a book, to be called "The Register of Shareholders," the names of all persons entitled to shares, with the number of shares to which each is entitled, which book is to be authenticated by the seal of the company. By the 28th section, this register is made primâ facie evidence of a party therein named being a shareholder; it is not, however, conclusive, for he may, notwithstanding, shew that his name has been put there without his consent. By the 27th section, the company, in actions for calls, must prove that the defendant was a shareholder in the undertaking at the time the call was made; that is, a shareholder, in the sense of the 8th and 9th sections. The result is, that there is no

register until after it is sealed; and no person who was not an original subscriber can be liable as a shareholder, unless his name is on a sealed register. Probably that is required both in the case of an original subscriber and a transferee of scrip. It is only necessary, in this case, to say that a transferee is not liable for calls until after his name is entered on a sealed register. That was not done here until after the first call was made; and the rule must, therefore, be absolute.

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ALDERSON, B., and PLATT, B., concurred.

Rule absolute.

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ASSUMPSIT on a policy of assurance on the ship "Governor Halket," at and from Liverpool to Quebec, during her stay there, and from thence back to her discharging port in the United Kingdom, and until she had moored at anchor twenty-four hours in good safety." Averment, "that the ship, with goods on board, departed and set sail on her voyage back from Quebec to her discharging port in the United Kingdom, to wit, Wallasey Pool; and afterwards, and whilst the ship was so proceeding on her voyage, and before she had arrived at her discharging port in the United Kingdom, to wit, at Wallasey Pool aforesaid, or had been moored

A vessel was insured "at and from Liverpool to Quebec, during her stay there, and from thence back to her discharging port in the United Kingdom, and until she had moored at anchor twenty-four hours in good safety." The vessel was chartered to take on board a cargo of timber at Quebec, and to proceed

therewith to Wallasey Pool, in the river Mersey, or as near thereto as she could safely get, and there discharge her cargo. The vessel sailed from Quebec on the 23rd July, 1845, and arrived in the Mersey on the 4th September, and anchored at the Bell Buoy. The next morning she was towed up by a steam-boat, and came abreast of Wallasey Pool; but, being unable to enter the pool by reason of her too great draft of water, the captain anchored and proceeded to Liverpool to report the vessel, and engaged lumpers to discharge the cargo at a fixed rate of payment, which was to include the expense of rafting the timber from the vessel into Wallasey Pool, and discharged his crew, as was usual on a ship's arrival at Liverpool. He then proceeded to discharge the deck cargo, and afterwards a considerable portion of the other cargo, by the usual mode, at the stern port; and after occupying in this way several days, the ship, on the 14th September, fell over and sustained damage. The captain always intended to take the vessel into Wallasey Pool with as much of the cargo on board as he could carry with safety:—*Held*, that, under the above circumstances, the underwriters were not liable, the vessel having been moored in safety twenty-four hours after her arrival at her port of discharge.

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at anchor at her said discharging port twenty-four hours in good safety," she was stranded, bulged, and damaged.

The defendant pleaded (with other pleas) a plea, traversing in terms the averment that the ship was lost while proceeding on her voyage, and before she had arrived back to her discharging port, and had moored at anchor twenty-four hours in good safety.—Upon which issue was joined.

At the trial, before *Rolfe*, B., at the Liverpool Spring Assizes 1847, it appeared that the vessel was chartered to take on board at Quebec a cargo of timber, and to proceed therewith to Wallasey Pool, in the river Mersey, or as near thereto as she could safely get, and there discharge her cargo. On the 23rd of July, 1845, the vessel sailed from Quebec; on the 3rd of September she made Point Lynas, and on the following day anchored off the Bell Buoy, at the entrance of the river Mersey. The next day she was towed up the river by a steam-tug, and came abreast of Wallasey Pool; but, not being able to enter the pool for want of sufficient water, she anchored off Seacombe. The captain then proceeded to Liverpool to report the vessel; and on the 6th he discharged all the crew but eight men. He then commenced lightening the vessel for the purpose of getting into the pool, and engaged lumpers to discharge the cargo at a fixed rate of payment, which was to include the expense of rafting the timber from the vessel into the pool. On the 8th, he discharged the remainder of the crew, except the mate and carpenter, and unloaded all the deck cargo. The vessel being thus lightened, he was enabled to unload a considerable part of the cargo by the stern port; and he continued to discharge the cargo and raft the timber into the pool until the 14th of September, when she fell over and sustained the damage for which the present action was brought. It was proved that the captain always intended ultimately to take the vessel into Wallasey Pool, with as much of the cargo on board as he could carry with safety.—On the opening of the defend-

ant's case, the learned judge ruled, that, under the above circumstances, the underwriters were not liable, inasmuch as the vessel had moored in *safety* twenty-four hours after her arrival at her port of discharge, or as near thereto as she could safely do, and that the captain had discharged a substantial part of the cargo; and his Lordship directed a verdict to be entered for the defendant.

A rule nisi having been obtained to set aside the verdict, and for a new trial,

Martin and *Crompton* shewed cause in Hilary Term (January 20).—The question is, at what time did the risk of the underwriters terminate? If the vessel had arrived at Wallasey Pool, and had there remained, with her crew on board, waiting to proceed to her place of destination, it cannot be denied that the policy would have been in force. But admitting the true construction of the policy to be, that the risk shall continue until the arrival of the vessel "at the wharf of her discharging port," still the ruling of the learned judge was correct; for the captain had discharged his crew altogether, and had proceeded to discharge part of the cargo. On that ground the present case is distinguishable from *Samuel v. The Royal Exchange Assurance Company* (a). There the vessel was insured from Sierra Leone to London, and the insurance was to endure until she had been moored in good safety twenty-four hours. The vessel arrived in the evening of the 18th of February, and the captain, having orders to take her into the King's Dock, at Deptford, moored her near the dock gates. On the following morning he was informed at the dock that no order for his admittance had been received, but that if it had, the vessel could not be then admitted, on account of the quantity of ice in the river. The order was sent by the Navy Board on the 21st, but, on account of the ice, the

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(a) 8 B. & C. 119.

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ship could not be moved until the 27th; and then, in warping her towards the dock, a rope broke, she grounded, and was totally lost. The jury found that the vessel remained at her moorings from the 18th to the 27th of February on account of the ice, and not for want of an order to enter the dock. Upon that finding it was held, that the plaintiff was entitled to recover; for that, the place where the vessel was moored not being the place of her ultimate destination, the policy did not expire when she had been there in safety twenty-four hours; and as the vessel remained at those moorings on account of the ice, and not waiting for the order, the underwriters were not discharged by the delay. The correct rule on this subject is laid down in the case of *Leigh v. Mather (a)*. There the ship was insured at and from Georgia to Jamaica, and till moored twenty-four hours in safety. The ship sailed from Georgia, and arrived at Montego Bay, in the island of Jamaica. She remained there nearly a month, and then sailed for St. Ann's, in that island, and was lost in her passage thither. The defence was, that the policy ended on the ship's arrival at Montego Bay, and remaining there twenty-four hours, and that the loss was, therefore, not within the policy, it having happened after her departure. Lord *Kenyon* said, "that where a ship is insured to any particular port of delivery, if by stress of weather she is forced into a different port, and there discharges part of her cargo, and afterwards proceeds to her port of delivery, he was of opinion that the policy remained good; but that where a ship, under a general policy to Jamaica, and until moored twenty-four hours, came to any port, and there voluntarily remained, and discharged part of her cargo, such, in his opinion, put an end to the policy, after remaining there twenty-four hours, whether the policy was on the ship or goods." In *Dalglish v. Brooke (b)*, the insurance was on goods from

(a) 1 Esp. 411.

(b) 15 East, 295.

London to any ports or places in the Baltic, with liberty to touch, stay, and trade at all places, and to take in and discharge goods wheresoever the ship might touch at, but warranted free from capture or seizure in the ship's port of discharge. The ship arrived in the outer road of Pillau, which is a bar harbour, where large ships are obliged to discharge part of their cargoes into lighters, to enable them to go over the bar into the other harbour, where they discharge the remainder. The captain, having anchored, went on shore to report his ship and cargo, and obtain permission to discharge his cargo; and after a delay of five or six days returned on board, accompanied by Prussian soldiers and a pilot, who took possession of the ship and cargo, and discharged part of it into a lighter, in the place where the ship remained at anchor, and afterwards carried her over the bar into the inner harbour, where the goods were eventually confiscated; and it was held, that this was an arrival in the captain's elected port of discharge; and that the underwriters were not liable for the loss by seizure there. So here, "the port of discharge" means that place where the captain thinks proper to commence discharging a substantial part of the cargo. Suppose the intention had been to discharge different portions of the cargo at three different docks; is the policy to remain in force until the vessel had entered every one of the docks? It is clear, that where the policy is on a voyage to an island or district comprehending several ports, the risk on the outward voyage ceases after she has been moored at the first port: *Park on Insurance*, 73; *Camden v. Cowley* (a).

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Watson and *J. Henderson*, in support of the rule.—The vessel's place of destination was Wallasey Pool, and the removal of part of the cargo was merely to enable the vessel to reach her port of discharge. The case of *Samuel*

(a) 1 W. Bla. 417.

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v. *The Royal Exchange Assurance* (a) shews that the "port of discharge" means the place where the cargo is to be ultimately discharged. Here part of the cargo was removed, but with the intention of lightening the vessel, not of discharging the cargo. At all events, the question of intention should have been left to the jury. In the case of *Waples v. Eames* (b), the ship was insured at and from Leghorn to the port of London, and till there moored twenty-four hours in good safety. She arrived on the 8th of July at Fresh Wharf, and moored, but was the same day served with an order to go back to the Hope to perform a fourteen days' quarantine. The men upon this deserted her; and on the 12th of the month the captain applied to be excused going back, which petition was adjourned to the 28th, when the Regency ordered her back, and on the 30th she went back, performed the quarantine, and then sent up for orders to air the goods, but before she returned the ship was burnt on the 23rd of August. *Lee, C. J.*, ruled, "that though the ship was so long at her moorings, yet she could not be said to be there in *good safety*, which must mean the opportunity of unloading and discharging; whereas here she was arrested within the twenty-four hours, and the hands having deserted, and the Regency taken time to consider the petition, there was no default in the master or owners." A similar principle of construction will govern this contract as that relating to the lay-days allowed by a charter-party for a ship's discharge, which are to be reckoned from the time of her arrival at the usual place of discharge, and not at the port merely, though she should, for the purposes of navigation, discharge some of her cargo at the entrance of the port, before arriving at the usual place of discharge: *Brereton v. Chapman* (c). The cases of *Blackenhagen v. The London Assurance Company* (d), and

(a) 8 B. & C. 119.
 (b) 2 Stra. 1243.

(c) 7 Bing. 559.
 (d) 1 Camp. 454.

Brown v. Vigne (a), shew that the true criterion in this case is, what was the object and intention of the captain in discharging part of the cargo? It is stated in a note to *Brown v. Vigne*, that according to the report of the case of *Blackenhagen v. The London Assurance Company*, by Mr. Park (b), Lord *Ellenborough* said, "that though a ship, from necessity, might be allowed to take a circuitous course, yet the ultimate point of destination must ever be the same." *Dalglish v. Brooke* (c) turned upon the meaning of the term "port of discharge," in a warranty against capture; in which case the term has been held to include the whole circuit of the sea or river where the owner elected to discharge. *Jarman v. Coape* (d), *Keyser v. Scott* (e), *Levin v. Newnham* (f), and *Raynor v. Pearson* (g), decided, that where the policy contains such a warranty, it is a question of fact for the jury, whether the place where the capture was made was the port where the ship meant to discharge. In the present case, the consideration of that question was wholly withdrawn from the jury.—They also referred to *Laurie v. Douglas* (h).

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Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B.—This was an action on a policy of assurance, on the ship *Governor Halket*, at and from *Quebec* to her port of discharge in the United Kingdom.

By the charter-party of the vessel, which was put in, the vessel was chartered to take on board a cargo of timber

(a) 12 East, 283.

(b) Park on Insurance, 383,
8th ed.

(c) 15 East, 295.

(d) 13 Id. 394.

(e) 4 Taunt. 660.

(f) Id. 722.

(g) Id. 662.

(h) 15 M. & W. 746.

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at Quebec, and to proceed therewith to Wallasey Pool, in the river Mersey, or as near thereto as she could safely get, and there discharge her cargo.

It appeared at the trial, that the vessel sailed from Quebec on the 23rd of July, 1845, and arrived in the Mersey on the 4th of September, and came to an anchor at the Bell Buoy in that river. The next morning she was towed up by a steam-boat, and came abreast of Wallasey Pool; but being unable to get into Wallasey Pool, by reason of her too great draft of water, the captain anchored there, and proceeded to Liverpool to report the vessel, and engaged lumpers to discharge the cargo at a fixed rate of payment, which was to include the expense of rafting the timber from the vessel into Wallasey Pool, and discharged his crew, as was usual on a ship's arrival at Liverpool, altogether. He then proceeded to discharge the deck cargo, and afterwards a considerable portion of the other cargo, by the usual mode, at the stern port, from the hold of the vessel; and after occupying in this way several days, the ship being at anchor, on the 14th of September fell over and sustained damage, the subject of the present action; and the question is, whether the underwriters were at the time of this accident off the policy, by reason of the vessel having been moored in safety twenty-four hours after her arrival at her port of discharge. It appeared in evidence, that the captain always intended ultimately to carry the vessel into Wallasey Pool, with as much of the cargo on board as she could carry over the shallow part intervening between his original anchorage and the pool. But it was also clearly established, that the discharge of the cargo was going on in due course, and that if the water were not sufficient, and no accident had occurred, the whole cargo would have been discharged in the place where the vessel was moored.

My Brother *Rolfe* held, under these circumstances, that

the underwriters were not liable, and we think he was right in so holding.

Here the ship was bound to Wallasey Pool, or as near thereto as she could safely get, and it is clear that that was the intended place for the discharge of her cargo. The cases on this subject are well collected in Mr. Hildyard's edition of *Park on Insurance*, vol. i. p. 73. We were referred in the argument to *Samuel v. The Royal Exchange Company* (a); but this case is clearly distinguishable from it, because there the vessel had not arrived at the place where any part of her cargo was ever intended to be discharged: the vessel here had on the 5th September arrived as near to Wallasey Pool as she could safely get, and did actually begin to discharge her cargo accordingly, discharging her crew altogether, and leaving none of them on board for the purpose of further navigation. The case of *Brereton v. Chapman* (b) does not appear to us at all to affect this question. There the vessel was still in progress to the ultimate place for the discharge of her whole cargo, and all that was done was to put on board lighters a portion of the cargo, in order that the vessel might be enabled thereby without delay to proceed with them to the usual place of discharge. There the whole crew remained on board, and the vessel was in all respects really continuing her voyage. *Keyser v. Scott* (c), and *Dalgleish v. Brooke* (d), are authorities shewing rather that "the port of discharge" includes the whole port within which any portion of the cargo is usually, according to the custom of such port, taken out of the vessel. These are authorities going on a totally different principle, viz., that of the construction of a warranty from seizure in the port of discharge; but, if at all applicable to the present question, they go further than this case requires us to do.

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(a) 8 B. & C. 119.

(b) 7 Bing. 559.

(c) 4 Taunt. 660.

(d) 15 East, 299.

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Upon the whole, we think that here the vessel had clearly arrived at her port of discharge, and was actually in the course of discharging her cargo, and had moored there twenty-four hours in safety before the accident occurred. The rule therefore must be discharged.

Rule discharged.

Feb. 18. THE NORTH AND SOUTH SHIELDS FERRY COMPANY v.
 BARKER and Others.

CASE.—The first count of the declaration stated, that the plaintiffs, before and at the time of the committing of the grievances, &c., were and still are lawfully possessed of a certain ferry, with the appurtenances, upon and over and across the river Tyne, between the towns of North Shields, in the county of Northumberland, and South Shields, in the county of Durham, for the carriage and conveyance of carriages, horses, cattle, goods, wares, merchandise, and other portable articles, and foot passengers, over the said river Tyne, in boats and vessels kept by and by the authority of them, the plaintiffs, there for that purpose, taking for the same certain reasonable tolls, freights, and ferryages, In an action for the disturbance of a ferry, the first count of the declaration stated, that the plaintiffs were possessed of a ferry across the river Tyne, between North Shields and South Shields, for the conveyance of carriages, &c., and passengers, and that the defendants disturbed this ferry by carrying passengers. The second count stated a right to an ancient ferry. The defendants pleaded (*inter alia*) not guilty, not possessed, and also that the boat used by the defendants was of less than four tons burthen. The company was incorporated by the 10 Geo. 4, c. xcvi, for establishing a ferry across the river Tyne, within the limits of Tynemouth and the townships of South Shields and Westoe. Section 85 enacts, that, after the ferry shall be established, no other ferry shall be set up and used by any person across the river Tyne, within the said limits; and if any person (except the company, or persons acting under their authority) shall use any boat or other vessel of the burthen of four tons or upwards, in ferrying for hire across the river within the limits aforesaid, every person so offending shall forfeit £5. At the time the above statute passed, there was an ancient ferry across the river within the same limits, which the company, under the powers of their act, purchased of the owners:—*Held*, first, that the word “burthen” in the 85th section, did not mean “register admeasurement,” but capacity of carrying. Secondly, that the latter part of the 85th section did not limit the general right of ferry, but only added a cumulative remedy by way of penalty. Thirdly, that there was no variance by reason of the first count describing the ferry generally from North Shields to South Shields, and not from one particular terminus to another. Fourthly, that the mere act of ferrying passengers was a disturbance of the franchise, although the franchise was not of a prescriptive ferry, to the exclusion of all private boats, but simply of a ferry. Fifthly, that, on the purchase of the ancient ferry and completion of the new ferry, the former became extinct by operation of the act of Parliament.

to the plaintiffs in that behalf due and of right payable. Yet the defendants, well knowing the premises, but contriving to disturb and injure the plaintiffs in the peaceable and lawful enjoyment of their said ferry, heretofore, to wit, on the 24th day of May, A.D. 1847, and on divers other days between that day and the commencement of the suit, unlawfully, injuriously, and wrongfully, against the will of the plaintiffs, carried and conveyed in a certain boat of them, the said defendants, divers foot passengers for hire, over and across the said river Tyne, and upon the said part of the said river where the plaintiffs had such ferry as aforesaid, and upon and within the said ferry of them, the plaintiffs; by reason whereof the plaintiffs have lost divers great gains and profits, which would otherwise have accrued to them from the said ferry; and have been disturbed and disquieted in the possession thereof, and in their right and title thereto.

Second count.—That before and at the time of the committing the several grievances, &c., the plaintiffs were and still are possessed of a certain ancient ferry, with the appurtenances, upon and over and across the river Tyne, between the towns of North Shields, in the county of Northumberland, and South Shields, in the county of Durham, for the carriage and conveyance, for certain reasonable tolls, freights, and ferryages, to the plaintiffs in that behalf due and of right payable, of foot passengers over the said river Tyne, to the exclusion of all other persons carrying and conveying any foot passengers for hire over and across the said river Tyne, upon the part of the said river where the plaintiffs had and have such ferry as last aforesaid, save and except certain persons called scullermen, carrying and conveying such passengers as aforesaid, in certain boats called sculler-boats. Yet the defendants, well knowing the premises, but contriving to disturb and injure the plaintiffs in the peaceable and lawful enjoyment of the said ferry, heretofore, to wit, on the 24th day of May, in the year of

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our Lord 1847, and on divers other days and times between that day and the commencement of this suit, unlawfully, injuriously, and wrongfully, and against the will of the plaintiffs, carried and conveyed, in a certain boat of them, the said defendants, divers foot passengers for hire over and across the said river Tyne, and upon the said part of the said river where the plaintiffs had and have such ferry as aforesaid, and upon and within the said ferry of them, the plaintiffs; they, the defendants, at the said several times, &c., not being such scullermen as aforesaid, and the said boat in which &c. not being such sculler-boat as aforesaid; by reason whereof the plaintiffs have lost divers great gains and profits, which would otherwise have accrued to them from the said last-mentioned ferry, and have been disturbed and disquieted in the possession thereof, and in their right and title thereto.

The defendants pleaded (*inter alia*), first, not guilty. Secondly, to the first count, that the plaintiffs were not possessed of the ferry in that count mentioned. Thirdly, a similar plea to the second count. Fourthly, to the first count, that the plaintiffs are the body politic and corporate called the North and South Shields Ferry Company, mentioned in an act of Parliament passed in the reign of his late Majesty King George the Fourth, being "An Act" &c., and that the ferry in that count mentioned is the same ferry which in and by the said act is mentioned, and which the plaintiffs are thereby authorised and empowered to establish, keep, and maintain; and that at the said several times when &c., in the first count mentioned, the said boat, wherein the defendants carried and conveyed the foot passengers, was a boat of a burthen of less than the burthen of four tons, to wit, of the burthen of three and a half tons; wherefore the defendants, at the time when &c., carried and conveyed the said foot passengers, for hire, &c., where the plaintiffs had such ferry as in the first count mentioned, and within the said ferry of the plaintiffs, as the defendants

then lawfully might, for the cause in this plea alleged. Verification. The plaintiffs joined issue on the three first pleas; and to the fourth replied, that the boat in which &c., was a boat of a burthen not less than four tons, to wit, of the burthen of four tons, concluding to the country; and upon that replication the defendants joined issue.

At the trial, before *Wightman*, J., at the Liverpool Summer Assizes, 1847, it appeared that the dean and chapter of Durham, from time immemorial, were possessed of a ferry across the river Tyne, within the limits of the parish of Tynemouth, on the north side of the river, and the townships of South Shields and Westoe, on the south side. The plaintiffs were incorporated by the 10 Geo. 4, c. xcviij, intituled "An Act for establishing a Ferry across the River Tyne, between North Shields, in the county of Northumberland, and South Shields, in the county of Durham," &c. (a).

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(a) Sect. 1—"Whereas there is at present no convenient means of conveyance or communication across the river Tyne, between the towns of North Shields, in the county of Northumberland, and South Shields, in the county of Durham: And whereas, from the greatly increased and still increasing population of the said two towns of North and South Shields, there is much necessity for convenient means of intercourse between the inhabitants thereof; and it would greatly contribute to the advantage, accommodation, and safety of such inhabitants, and be of great public utility, to have a convenient ferry established for carriages, horses, cattle, goods, wares, merchandise, and other portable articles, and foot passengers, over the said river Tyne, between North

and South Shields aforesaid; and to have a good road, avenue, way, or passage for such ferry, at North Shields aforesaid, to and into the main street of the low town of North Shields, called Duke-street; and, also, to have a good road, avenue, way, or passage, from such ferry at South Shields aforesaid, to and into the street called Dean-street, communicating with the market-place in South Shields aforesaid: And whereas the several persons hereinafter named are willing and desirous of undertaking the execution of the purposes aforesaid, and of being united into a company for that purpose"—enacts, that certain individuals named, and other persons from time to time proprietors, "their respective successors, executors, administrators, and assigns, shall be, and they are here-

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The second section (a) empowers the company to establish

by united into a company, for making, establishing, and maintaining a ferry across the river Tyne, between North and South Shields aforesaid, for carriages, horses, cattle, goods, wares, merchandise, and other portable articles, and foot passengers, with proper roads, avenues, ways, or passages, to and from such ferry, according to or consistently with the rules, orders, and directions hereinafter contained; and for that purpose shall be one body politic and corporate, by the name and style of 'The North and South Shields Ferry Company;' and by that name shall have perpetual succession and a common seal; and by that name shall and may sue and be sued, plead and be impleaded, at law or in equity, and shall and may prefer and prosecute any bill or bills of indictment against any person or persons who shall commit any felony, misdemeanor, or any offence indictable by the laws of this realm; and shall and may have power and authority, from time to time and at all times, to purchase and hold to them and their successors and assigns, any lands, tenements, and hereditaments, for the use of the said undertaking, in manner by this act directed, without incurring any of the penalties or forfeitures of the Statutes of Mortmain; and also to sell and convey any of the lands, tenements, and hereditaments so purchased in manner by this act directed."

(a) Enacts, "that it shall and may be lawful for the said com-

pany, and they are hereby authorised and empowered, to establish, keep, and maintain a ferry, consisting of one or more steam or other boat or boats, barge or barges, float or floats, raft or rafts, or such other vessel or vessels as shall be sufficient and proper for the conveyance and passage of horses, carriages, cattle, goods, wares, merchandise, and other portable articles, and foot passengers, over and across the said river Tyne, between North Shields and South Shields aforesaid; and to erect and build ferry-houses and proper offices on each side of the said river, for the habitation and use of the ferrymen having the care and management of the said ferry so to be established as aforesaid, and for the convenience of persons using the same; and to make and keep in repair proper causeways, at the landing-places of the said ferry so to be established as aforesaid, on each side of the said river; and from time to time to do, or cause to be done, all other things necessary and convenient for establishing, maintaining, regulating, and managing the said common ferry, and making the same as useful and advantageous as may be; and all persons with carriages, horses, cattle, goods, wares, merchandises, and other portable articles, and all foot passengers, shall have free liberty to pass over the said ferry so to be established as aforesaid, (upon payment of the respective tolls hereinafter granted,) without any hindrance or inter-

a ferry. The 9th section (a) enables the company to treat with the owners for the purchase of houses and land, or of any ferry or ferries across the river Tyne. The 85th section enacts, "that from and after the said ferry, to be established by virtue of this act, shall be made fit for carriages, horses, cattle, and foot passengers, no other ferry shall be set up and used, by any person or persons, across the said river Tyne, within the limits of the parish of Tynemouth, in the said county of Northumberland, and within the limits of the townships of South Shields, and Westoe otherwise Wivestoe, in the parish of Jarrow, in the said county of Durham; and if any person or persons (except the said company, or other person or persons acting under their authority) shall use any boat, barge, float, draft, or other vessel, of the burthen of four tons or upwards, in ferrying or carrying any horse, cattle, or foot passenger, for hire, across the said river, within the limits aforesaid, every such person or persons so offending shall, for every such offence, forfeit and pay any sum not exceeding five pounds, to be recovered in manner hereinafter mentioned." By indenture of the 20th December, 1829, the dean and chapter of Durham, in consideration of one-fifteenth share of the net annual profits to arise from the ferry about to be established by the company, "granted, released, assigned, and confirmed, to the company and their successors," the ancient ferry, "to hold the said ferry, ferry-barge, and premises, with the appurtenances,

ruption of or by any person or persons whomsoever."

(a) Enacts, "That it shall be lawful for the said company to treat, contract, and agree with such person or persons, or body or bodies politic, corporate or collegiate, spiritual or lay, respectively, as shall be or be deemed to be the owner or owners of or interested in any houses, buildings, lands, tenements, or heredita-

ments, which may be necessary for the purposes of this act, or of or in any ferry or ferries across the river Tyne, for the purchase thereof respectively, or for any loss or damage such owner or owners, or any of them, or any other person or persons, shall or may sustain by reason of the execution of any of the purposes of this act."

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unto and to the use of the company and their successors for ever." In May, 1847, the defendants, who were the promoters of an undertaking provisionally registered, and called "The Tyne Direct Ferry Company," commenced carrying passengers, for hire, across the river Tyne, within the limits of the plaintiffs' ferry, by means of a steam-boat of less than four tons burthen, register admeasurement, but capable of carrying about forty tons weight. It appeared that the sculler-boats had constantly plied for hire within the limits of the ancient ferry, without interference from the dean and chapter. On the part of the defendants it was submitted, first, that the word "burthen," in the 85th section, meant "register admeasurement," and not "capability of carrying," and consequently the defendants had not disturbed the plaintiffs' right of ferry, by plying with a boat of less than four tons burthen. Secondly, that the right of ferry was improperly described in the first count, inasmuch as, by the 85th section, the plaintiffs had only a limited right, to the exclusion of boats of four tons burthen and upwards. Thirdly, that the ancient ferry described in the second count had merged in the parliamentary ferry. The learned judge directed a verdict for the plaintiffs, reserving leave for the defendants to move to enter a verdict for them.

Knowles, in last Michaelmas Term, moved to enter a verdict for the defendants, or to arrest the judgment on the second count.—The defendants are entitled to have the verdict entered for them upon the issue to the fourth plea, which is pleaded under the authority of the 85th section. The boat used by the defendants was a vessel under four tons, according to the ordinary method of measurement. By that mode vessels must contain a certain number of cubic feet per ton. The word "*ton*," which was formerly spelt "*tun*," seems to be derived from the vessels in which wine used to be carried, and formerly a duty was payable by importing vessels in a certain number of tons

of wine: 1 Blac. 315. The defendants' vessel did not contain the number of cubic feet requisite to make a vessel of four tons' burthen. The Pilot Act, 6 Geo. 4, c. 125, was in force when the present act was passed. [*Pollock*, C. B.—The words of the 85th section of this act are, "any boat, barge, float-raft, or other vessel of the *burthen* of four tons." The word used is "burthen," and not "measurement." In ordinary language, "*tonnage*" is with reference to the number of tons a vessel is capable of carrying. *Alderson*, B.—If the position for which you contend were correct, floats and rafts would be unprovided for by the act, as they have no depth, and consequently are not capable of that sort of measurement. *Parke*, B.—The act clearly means, by *burthen*, capacity to carry; and by such a construction it applies to all the vessels enumerated, which it would not upon the other construction. Upon this point, therefore, there will be no rule.]—He then urged the objections taken at the trial, and also that there was a variance between the first count and the evidence, because the statute granted a ferry across the river Tyne, within the limits of the parish of Tynemouth on the one side, and the limits of the townships of South Shields and Westoe on the other side; whereas the first count alleged a right of ferry between North Shields and South Shields.

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A rule nisi having been granted on these latter points,

Martin, *S. Temple*, and *Heath* shewed cause (Feb. 12).—The first question is, whether the ferry is properly described in the first count. That count is framed on the 10 Geo. 4, c. xcvi; and it is said that, under the 85th section of that act, the company have a limited right of ferry only, that is, to the exclusion only of boats of four tons burthen and upwards, and that the first count should have so described it. That, however, is not the true construction of the act. The second section gives the company an absolute right of ferry; the 86th section

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only exempts scullermen from the penalty imposed on persons disturbing the ferry. The term "ferry" implies an exclusive right of conveyance. The definition given in the *Termes de la Ley* is — "A liberty, by prescription or the king's grant, to have a boat for passage upon a great stream, for carriage of horses and men, for reasonable toll." [*Alderson*, B., referred to *Huzzey v. Field* (a).] The company having, by the second section, an exclusive right of conveying passengers, &c., across the river from one district to another, are at common law entitled to bring an action for the infringement of that right. The meaning of the 85th section is, not that persons shall be at liberty to use boats under four tons' burthen, but the object of that enactment is to provide a summary remedy against persons using boats of that burthen and upwards. If the latter part of the clause had been omitted, the statute would clearly have operated as an absolute grant of the ferry. Then how can the mere imposition of a penalty on a particular class of persons restrain the general right? The former part of the section prohibits all persons from setting up another ferry; the latter part is cumulative on the former. In any other view the 86th section, which enables persons to use boats to go to vessels, would be unnecessary. A similar instance of a cumulative penalty will be found in the case of *Beckford v. Hood* (b), which arose on the Copyright Act.—They also cited *The Bailiffs of Tewkesbury v. Bricknell* (c), *Hinks v. Clerk* (d).

Then as to the second count. The ancient ferry is not merged or extinguished by the grant of the parliamentary ferry. By the second section of the 10 Geo. 4, c. xcvi, power is given to the company to establish a ferry within certain limits. The 9th section enables the company to purchase land, or "any ferry or ferries across the river Tyne." The 18th section provides, that, on payment of the purchase-money, the land, "ferry or ferries, together with

(a) 2 C., M., & R. 432.

(b) 7 T. R. 620.

(c) 1 Taunt. 143.

(d) 2 Lev. 252.

the yearly profits thereof, and all the estate, use, trust, and interest of any person or persons therein, shall from thenceforth be vested in and become the sole property of the company for the purposes of the act, for ever." The case of *The Kingston-upon-Hull Dock Company v. La Marche* (a) is relied upon by the other side. That case decided, that where premises vested in a company for the purposes of a particular statute, their rights depend upon the statute, and must be limited by it. That principle is not denied, but it has no application to the present case. A ferry is publicis juris. It is a franchise which no one can erect without licence from the crown; and when one is erected, another cannot be erected without an ad quod damnum: *Blisset v. Hart* (b). Non-user is no answer to an action for disturbance of a right of ferry; but if there be a neglect of duty on the part of the owner, the crown may on that ground repeal the grant by scire facias or quo warranto: *Peter v. Kendall* (c). If the grant of the parliamentary ferry caused a merger of the ancient ferry, the latter might have been altogether lost; for, by the 31st section, the powers of the company cease if their ferry be not completed within five years.

Knowles and *Unthank*, in support of the rule.—The ferry is misdescribed in the first count. It is true that the 2nd section gives the company a right to establish a ferry, but the 85th section explains the nature of the right. The grant is in derogation of the common-law right of all persons to use a navigable river, and ought to be construed strictly. The 2nd and 85th sections, taken together, render it lawful for any person to use the ferry, provided he does so with boats of less than four tons burthen. If any ambiguity exists, the construction must be in favour of the public: *Waterhouse v. Keen* (d). The present case is governed by

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(a) 8 B. & C. 42.

(c) 6 B. & C. 703.

(b) Willes, 508.

(d) 4 B. & C. 208.

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the principle laid down in the *Kingston-upon-Hull Dock Company v. La Marche*; namely, that where a person takes a beneficial grant under an act of Parliament, he only takes such right as is clearly and unambiguously granted. A parliamentary grant of a ferry does not of itself exclude any other ferry; such right can exist only by immemorial custom. It is analogous to the grant of a port or of a market: *Hale, De Portibus Maris*; *The Mayor of Macclesfield v. Chapman* (a). The precedents of an exclusive right of ferry, allege a right to carry "all" passengers: that word is not found in this act of Parliament. But even assuming that the company are entitled to an exclusive right of ferry, there is nevertheless a variance between the first count and the proof; for the statute only gives a right of ferry between certain termini, which are specifically defined, and not from North Shields to South Shields. All persons would have a right to use the river as a public highway, from or to all places on it, banks, not in the line leading from one terminus to another; *Hussey v. Field* (b).

They then argued that the ancient ferry was not extinct, and relied upon the recital of the statute, and also the language of the 9th, 18th, and 85th sections.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—In this case, which was argued before us a few days ago, on shewing cause against a rule to enter a verdict for the defendants upon some points reserved at the trial, several questions were discussed.

The declaration contained two counts, one stating the plaintiffs to be possessed of a ferry across the Tyne, between North Shields and South Shields, for the conveyance of

(a) 12 M. & W. 18.

(b) 2 C., M., & R. 432.

carriages, &c., and passengers; and that the defendants disturbed this ferry by carrying passengers. The second count stated an ancient right of ferry, to the exclusion of all other persons carrying foot-passengers for hire over the river on that part where the plaintiffs had a ferry, save and except scullermen carrying in sculler-boats.

Not guilty was pleaded, and possession of the ferries traversed.

One objection was made, which may be immediately disposed of, viz. that there was a variance between the allegation in the first count and the evidence, because by the act of Parliament the ferry was granted from a particular terminus to another, and not generally from North Shields to South Shields; but this objection was not taken at the trial, and therefore it is unnecessary to consider whether it is a variance or not, though it really is not, as the point was decided in *Pim v. Curell* (a).

The more important objection was, that there was a misdescription of the ferry, as the act of Parliament, (10 Geo. 4, c. xcviij), looking at the whole of its provisions, granted to the company a limited right of ferry only, that is, to the exclusion only of boats of four tons burthen and upwards, and that the declaration did not allege that the defendants' boat was of that burden or upwards.

It was urged by Mr. Knowles, and properly, that this company, taking a beneficial grant under an act of Parliament, took only such right as was clearly and unambiguously granted, according to the principle laid down in *The Hull Dock Company v. La Marche* (b) and other cases.

Now, under the 1st section, the plaintiffs were erected into a corporation for establishing, and by the 2nd section had the power of establishing a ferry; and by this section they would have the same right as under a royal grant of the franchise of a ferry, which would entitle them

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(b) 8 B. & C. 42.

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to bring an action against any one who infringed their right, which is in the nature of a monopoly, by carrying persons from or to the same place, who otherwise, presumed, would have gone by the ferry.

But it is insisted that the 85th section qualifies that right, and limits it a right of ferry not by any boats, but by boats of four tons burthen and upwards, to the exclusion of all boats of that burthen, and no other. We do not think that this is the proper construction of the 85th section. The latter part does not appear to us to limit the general right of ferry given by the 1st and 2nd sections, but only to add a cumulative remedy by way of penalty, which is perfectly consistent with the existence of a general right. This view of the case is somewhat assisted by the consideration that the 86th section would have been unnecessary, if the intention of the legislature had been that all boats under four tons burthen should be unaffected by the grant of ferry: in that case there would have been no occasion for such a provision by way of greater caution. The argument, however, is not of much weight, because in any view of the case the clause was superfluous; but, unless on the supposition that all boats were meant to be excluded from the privilege of carrying over passengers, the necessity of this cautionary provision respecting all boats would not have occurred to the framers of the act.

Upon the ground, however, that the general right of ferry, clearly given by the 1st and 2nd sections, is not qualified by the 85th section, we think there is no misdescription of the right of ferry in the first count.

Another objection was made by Mr. *Unthank*, that the mere act of ferrying a passenger across was no disturbance of the franchise, unless the franchise was not simply of a ferry, but of a prescriptive ferry to the exclusion of all private boats; and he likened it to the case of a market, the grant of which franchise does not of itself imply a right to prohibit the selling in shops on a market day, *Mayor of*

Macclesfield v. Chapman (a), that right belonging only to immemorial markets, to which a special custom to exclude such sales belongs: *Morley v. Walker* (b). We do not assent to this distinction. In the case of a ferry, the act of taking across a person who would otherwise have gone by it is actionable, as the preventing a person from coming to a market to buy or sell there would be in the case of a market; and many instances are found, in the reported cases, of such infringements. The setting up a ferry is not the only infringement. A ferry is a highway for all the Queen's subjects paying the toll; and whether it is described in the declaration, as it is in most cases, as a ferry for *all* persons having occasion to use it, or, as it is in some, *for persons* having occasion to use it, the right is the same.

The counsel for the defendants then objected to the second count, that the ferry described in it was extinct. That is a question of some nicety. This ferry was one which had belonged to the Dean and Chapter of Durham, and had been purchased by the plaintiffs from them soon after the act of Parliament was passed; and it was contended that this was extinguished not by the act of Parliament itself, for it is clear this ferry was meant to continue afterwards, and to be the subject of purchase or compensation by the company, but that the meaning of the act was, that when bought, and the new ferry completed, the old ferry should cease to exist; the intention being, that one ferry only should at any time exist, and be under the control and direction of the plaintiffs.

Upon full consideration of all the clauses in the act of Parliament bearing upon this question, we are led to the conclusion that this view of the case is correct, and that it is inconsistent with the whole scope of the act, that the company should carry on more than one ferry; though they are empowered to purchase other ferries for the purpose of

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preventing the necessity of compensation from time to time, or at once, for the injury done to them. The result will be, that, in order to carry the intention of the legislature into effect, the ferry, when purchased, and when the new ferry was finished, became extinct by the operation of the act.

The recital in the act is, that it would be of great public utility to have a convenient ferry established with certain communications, which clearly indicate that it was meant to be on one particular spot. The individuals named are then incorporated for making, establishing, and maintaining *a ferry*, according to, or consistently with, the rules, orders, and directions thereafter contained; and the 4th and 5th sections shew that this is to be a ferry in a particular place, and according to a map or plan; and for the use of this undertaking the power is given to purchase lands, tenements, and hereditaments, without incurring the penalties of the Statutes of Mortmain. The 2nd section empowers the company, so incorporated, to establish, keep, and maintain a ferry, that is, one ferry only, and provide boats, build ferry-houses, and make, and keep, and repair proper landing-places and causeways to *that ferry*. The 36th section, enabling the company to mortgage, gives a form which mortgages *one ferry* only. The 45th section enables the company to make bye-laws for the regulation of that ferry, and the conduct of the persons employed in it, or making use of it: the 51st section, to make contracts with engineers, &c., for maintaining and improving *the said ferry*. The 69th section imposes a penalty for obstructing *the ferry*. The 70th empowers the company to demand tolls within certain limits, for passing *the said ferry*. The 75th prevents collectors of those tolls from taking undue tolls, or misbehaving themselves. The 82nd imposes penalties for evading the tolls.

Now, it does appear to us to be unreasonable to suppose that the legislature meant the purchased ferry to continue

and be managed by the company without any express powers to maintain it, to repair the ferry-houses and landing-places, or provide boats, or regulate the use of it, without imposing any limit upon the tolls to be collected or penalties upon the obstruction of it. It is also an observation worthy of remark, in confirmation of this view of the case, that the 28th section, which enables the company to re-sell, does not expressly authorise the re-sale of *ferries*.

Considering all these provisions, and looking at the express object of the incorporation of the company, the making and maintaining a *ferry*, we think that the powers of the company are confined to one ferry, and consequently the authority to purchase ferries must be construed to mean an authority to acquire them for the purpose of preventing competition, and at once satisfying the claims of the proprietors for compensation.

There is one section only which has a different aspect. The 18th section provides, that on payment or tender of the purchase-money, not merely the land, but the ferry or ferries, *together with the yearly profits thereof*, and all the estate, &c., shall thenceforth be vested in the company, for the purposes of the act, for ever. This expression, as to the yearly profits, which is not confined to lands, affords an argument that the ferry, or ferries, were intended to be kept up. The words, however, may be explained as meant to apply to the intermediate profits, after the purchase, and before the ferry which the company were to set up was completed, until which time the old ferry would not cease. At any rate, this expression does not appear to us to avail against the very strong inference to be derived from the other clauses of the act, and its general scope, that only one ferry was to belong to the plaintiffs at one time. We therefore think, that the issue on the last count, on the plea denying the plaintiffs' possession of the ancient ferry, must be found for the defendants.

The question of variance on this plea it is therefore

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unnecessary to consider; on the authority of the case of the *Bailiff of Tewkesbury v. Bicknell (a)*, we should probably hold the count to be proved.

The rule must therefore be discharged as to the first count, and absolute to enter a verdict for the defendants on the issue on "not possessed" to the second count.

Rule accordingly.

(a) 2 Taunt. 120.

Feb. 9.

BATES v. TOWNLEY and Another.

An award is not evidence of an account stated between the parties to the submission.

By articles of agreement between the plaintiff of the one part, and the defendants of the other part, certain differences between them were referred to arbitration, the costs of the reference and award to be in the discretion of the arbitrators. The arbitrators, after finding a sum due from the defendants to the plaintiff, awarded

ASSUMPSIT for money paid by the plaintiff for the use of the defendants, and for money due on an account stated between them. Plea, non assumpsit.

At the trial, before *Coltman, J.*, at the Chester Spring Assizes, 1847, it appeared that the plaintiff and defendants were stockbrokers, the former residing at Leeds, the latter at Liverpool; and that the plaintiff having claims against the defendants for money due in respect of dealings in railway shares, it was agreed that the matter should be referred to arbitration. Accordingly, on the 5th February, 1847, articles of agreement were entered into between the plaintiff of the one part, and the defendants of the other part, whereby, after reciting that "differences and disputes had arisen and were pending between the parties thereto, touching, or concerning, or arising out of certain dealings or transactions in railway shares," &c., it was witnessed

ed that the costs of the reference and award, including compensation to the arbitrators, should be borne as follows; that is to say, one moiety thereof by the plaintiff, and the other moiety by the defendants. The plaintiff took up the award, and paid the whole costs of it:—*Held*, that he could not recover a moiety of the costs as money paid for the use of the defendants.

that the parties thereto respectively agreed to refer the same to, and "abide by, the award, arbitrament, final end and determination of J. Head, of &c., a person chosen by or on behalf of the plaintiff, and J. Mills, of &c., a person chosen by or on behalf of defendants, and of such third person as should, before they should proceed on the said reference, be chosen by them, and appointed by writing under their hands, to be indorsed on those presents," &c. And it was further agreed, "that the costs of the reference and of the award to be made in pursuance thereof, including a reasonable compensation to the said arbitrators for their trouble, should be in the discretion of the said arbitrators, or any two of them, who should by their said award order and direct by whom, and to whom, and in what proportions and manner, the same should be paid; and, for the better enforcing performance of the award, either party should be at liberty to make the submission a rule of the Court of Common Pleas." The two arbitrators proceeded with the reference, and appointed a third, but his appointment was not indorsed on the submission, as required by it. On the 18th February, 1847, the three arbitrators made their award, whereby they "did award, find, and determine, that there was due from the defendants to the plaintiff in respect of the matters of difference referred to them the said arbitrators as aforesaid, the sum of 2039*l.* 10*s.* 3*d.*, which sum they did thereby award and direct that the defendants should pay to the plaintiff at the office of Mr. R. Norris, solicitor, North John-street, Liverpool, on Monday, the 1st day of March then next, at twelve o'clock at noon, in full satisfaction of the matters in difference." And they "did further award, that the costs of the said reference, and of that their award, including the compensation to them the said arbitrators for their trouble, should be paid and borne as follows; that is to say, one moiety thereof should be paid and borne by the plaintiff, and the other moiety thereof by the defendants." On the 22nd February the plaintiff took

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up the award, and paid the whole costs of it, amounting to 25*l.* 8*s.* 9*d.*, and on the following day served the defendants with notice thereof, but there was no express request to pay. The plaintiff now sought to recover 12*l.* 14*s.* 9*d.*, the moiety of those costs, as money paid for the defendants' use. The declaration contained a count on the award, which had been demurred to, and judgment given for the defendants (*a*); so the plaintiff now relied upon the award itself as evidence of an account stated. On the part of the defendants, it was objected that the plaintiff was not entitled to recover the moiety of the costs as money paid for the defendants' use, on the ground, first, that the award was not binding, the appointment of the third arbitrator not having been indorsed on the submission; secondly, that the costs of the reference were not ascertained, either by the award or by the taxation of the Court. In answer to the first objection, evidence was given of a waiver of the condition. It was also objected, that the award was not evidence of an account stated. The learned judge directed a verdict for the defendants on the count for money paid, and for the plaintiff on the account stated, reserving leave for each party to move to enter a verdict.

Cross rules having been obtained accordingly,

Cowling, Townsend, Egerton, and Burnie, in Hilary Term, (January 27), shewed cause against the defendants' rule to enter a verdict for them on the account stated.—It is conceded, that an award is not in every case evidence of an account stated; if, for instance, it directs a mere collateral matter, such as the building of a house, or if it be made respecting a claim for unliquidated damage, as in trespass for assault and battery. But where the submission is in respect of a *debt*, or a claim in the nature of a debt, the

(*a*) 1 Exch. 572.

parties must be taken to have appointed the arbitrator as their agent to settle the account. [*Parke, B.*—If the arbitrator is an agent, the principal might maintain an action against him, should he, through neglect, find a sum to be due which was not due. Is it not an abuse of the term, to say that an arbitrator who is to exercise his own judgment, is an agent?] An arbitrator has no discretionary power to award any sum he may think fit, but only to find what is in point of fact due. [*Pollock, C. B.*—An arbitrator is not an agent; his award is a judicial act.] In *Keen v. Batshore (a)*, where matters of account in dispute were submitted to arbitration, but not by bond, and the arbitrator awarded a certain sum to be due to the plaintiff, *Eyre, C. J.*, ruled that the sum awarded might be given in evidence under the common counts in assumpsit, and particularly as an account stated. [*Parke, B.*—That case proceeded on the ground that there were no arbitration bonds, and therefore it could not be treated as a reference.] The doctrine does not seem intended to be confined to such a case; indeed, if it be correct with respect to a verbal submission, it is equally so where the submission is in writing. That decision is adopted in *Watson on Awards (b)*, and *Starkie on Evidence (c)*. [*Platt, B.*—How can a party be charged with an account stated, unless he agrees to the account?] In *Salmon v. Watson (d)*, the defendant agreed verbally with the plaintiff to take a house, and purchase the fixtures at a valuation, to be made by two brokers. An inventory of the furniture and fixtures was accordingly made, described generally as “an inventory of the fixtures, &c., with the gross amount placed at the foot of it.” In an action for goods sold and delivered, with a count on an account stated, it was held, that the defendant, having taken possession of and enjoyed the furniture and fixtures, and paid part of the

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(a) 1 Exch. 194.

(b) Page 356, 3rd ed.

(c) Vol. ii, p. 98, 3rd ed.

(d) 4 Moore, 73.

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sum determined by the brokers to be due for the same, was liable on an account stated for the remainder. *Richardson, J.*, there says :—"The count as to the account stated goes to the whole of the appraisal, and, in point of fact, amounts to the same thing as if such valuation had been made between the original parties." An award does not, in every case, alter the condition of the parties. A judgment is not evidence of an account stated, because the original debt is merged in the specialty; but an award does not change the remedy, where it merely ascertains the amount of the debt: *Allen v. Milner (a)*. The only difference between an account stated and an award is, that in the former errors may be shown, but an award estops the parties from disputing its correctness.

But if an award is not of itself an account stated, it may at all events be used as proving a prior account stated; for an admission by a party, of anything due, is an admission of an account stated. [*Parke, B.*—It is settled, that there cannot be an account stated by a defendant, except with the plaintiff or his agent. It would not do to say, that defendant was heard to tell a stranger that he owed the plaintiff a certain sum of money.] The object of stating an account is, to enable the creditor to recover the debt, without proof of the consideration. [*Pollock, C. B.*—The count is on an account stated *between the parties*; then how can you infer privity from a statement to a third person?] In the ordinary case of an account stated, the plaintiff does not prove a prior debt, but only an *admission* of a debt due. [*Parke, B.*—It is distinctly laid down in *Brekon v. Smith (b)*, that the admission must be made to the opposite party or his agent. Some five-and-twenty or thirty years ago, very loose expressions might have done, but in more recent decisions the good sense of the matter prevails. The difficulty here is, to see how the independant act of a judge,

(a) 2 C. & J. 47.

(b) 1 Adol. & E. 488.

generally given against the consent of the party who is to pay, can be used as an account stated between the parties.] An award, by which parties agree to abide, cannot be considered as a decision in invitum. This case comes within the principle of *Freeman v. Bernard* (a). [Parke, B.—The distinction there pointed out by Lord Holt makes the matter clear; he says, “Where an award creates a new duty, instead of that which was in controversy, the party has remedy for it upon the award; and, therefore, if the party resorts to demand that which was referred and submitted, the arbitrament is a good bar against such action. Contra, where the award does not create a new duty, but the old duty, by a release of the action.”] In *Porter v. Cooper* (b), Parke, B., says:—“I take the rule to be this, that if there is an admission of a sum of money being due, for which an action would lie, that will be evidence to go to the jury on the count for an account stated.” [Alderson, B.—That must mean an admission to the creditor himself.] In *Slade v. Buchannan* (c), Lord Kenyon ruled, that admissions made by a party at a reference, which proved abortive, were receivable in evidence, provided they were such as the defendant would be obliged to make in his answer to a bill of equity. [Alderson, B.—Those are clearly admissions to the party: an answer in equity, is an answer to the plaintiff.]—They also cited *Kingston v. Phelps* (d), *Whitehead v. Tattersall* (e).

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Welsby and *Davison* appeared to support this rule, but were not called upon.

POLLOCK, C. B.—The rule must be absolute. The point is shortly this—whether an arbitrator is an agent for the parties to the submission so as to bind them by his award,

(a) 1 Ld. Raym. 247.

(b) 1 C., M., & R. 337.

(c) 1 Peake, N. P. 8.

(d) 1 Peake, N. P. 299.

(e) 1 Adol. & E. 491.

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as on account stated between them? I am clearly of opinion that he is not. Suppose a reference to two persons, or an umpire chosen by them, how could the umpire be considered as the agent of the parties? Or, suppose a reference to one person, could he be deemed the agent of the parties, so that a decision in his own mind is to be considered as a settlement of accounts between them. The cases cited are essentially different. In *Keen v. Batshore* (a), the reference went on without bonds, and *Eyre, C. J.*, thought it reasonable that the parties should have intended to do something by the reference; and, as bonds were not executed so as to make the person who acted an arbitrator, he told the jury that he was the agent of the parties, and therefore the consent to the reference bound them in the same way as if an account had been stated between their agents. That does not go the length of the present case, nor can I find in the text-books any authority which does. On the contrary, Mr. Watson, in his book on Awards, cautiously puts the decision exactly as it was, namely, that an award, under the circumstances of that case, was allowed to be given in evidence as an account stated. The other cases cited do not in any degree shew that an arbitrator has authority as agent of the parties. It would be confounding matters essentially different, if we were to hold that an arbitrator, who is a judge to decide between two parties, is an agent so as to make his award evidence of an account stated.

PARKE, B.—I concur in thinking, that there is no room for any doubt. The counsel for the plaintiff began their argument by assuming that this is a submission to settle items of a pecuniary demand. They acknowledge that, if the claim were for unliquidated damages, the position contended for could not be supported. Their argument then

(a) 1 Exch. 194.

fails in limine, because it is a submission in respect of unliquidated damages, namely, a claim arising from the non-delivery of railway shares. Even if the submission were in respect of pecuniary matters only, the award could not be given in evidence under an account stated, because an arbitrator is not the agent of the parties to settle their accounts, in which case the act of the agent would be the act of the principal, and the principal would have his remedy over against the agent, if he settled them improperly; but an arbitrator is a judge constituted by the parties, and who is to form his own judgment on the facts, and make an award binding on each party. In the absence of all authority, it seems to me that this award is not evidence of an account stated. It is not at all like the case where two persons meet together and agree upon the sum due from the one to the other, which is a statement of account. If there were any authorities in point, we should be bound by them, however much we might regret that the causes and forms of action should be so confounded. But the only case bearing on the subject is that of *Keen v. Batshore* (a), which is a short note of a Nisi Prius decision; from which, however, it is perfectly clear that Chief Justice *Eyre*, a very eminent judge, thought that, as there was no regular agreement to refer, constituting the arbitrator a judge, he must be considered as a delegate or agent for the parties; and his decision proceeds solely on the ground that the award in that particular case must be considered as a settlement of account by an agent appointed by each party; and it is clear that, if regular bonds of submission, or a regular submission to arbitration, had been entered into, he would not have admitted the award as evidence of an account stated. It therefore appears to me that there is no foundation for saying that this award, which must be taken as regularly drawn up, and which is a settlement of all demands, both

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liquidated and unliquidated, can possibly be said to be an account stated. The authorities cited are not sufficient to support such a proposition. The one mainly relied on, that of *Keen v. Batshore*, is (as already stated by the Lord Chief Baron) a case to which Mr. *Watson* does not appear to have attached much weight, as he merely states that it was so laid down.

ALDERSON, B.—I am of the same opinion.

PLATT, B.—An account stated is a settlement of account, in which both parties, or their agents, agree upon the amount due from the one to the other. Is, then, an arbitrator the agent of the parties for the purpose of stating an account? It seems to me that he acts not as agent, but as a judge; for, in many points, his decision would be adverse to the consent of either party.

Rule absolute.

Welsby and *Davison* then shewed cause against the plaintiff's rule to enter a verdict on the count for money paid.—The law will not imply a promise to repay the plaintiff the moiety of fees paid by him on taking up the award. Before the case of *Brittain v. Lloyd* (a), a notion prevailed, that, in order to support a count for money paid, the effect of the payment must have been to relieve the defendant from some liability. It is now, however, settled that the action is maintainable in every case in which the plaintiff has paid money to a third party, at the request, either express or implied, of the defendant, with an understanding, either express or implied, to repay it. The request to pay and the payment constitute the debt. But in this case there has been no request either express or implied, nor has the payment been made in consequence of any liability

(a) 14 M. & W. 762.

which the defendant was under. The money is ordered to be paid by each of the litigant parties in moieties, and there was no duty on either to pay more than his proportion. And as the misconduct of the arbitrators disentitles them to sue for their fees, in point of law it is not money payable at all. [*Parke, B.*—The plaintiff might not have been able to get the award without paying the whole of the fees.] The Court will not assume that each party, upon notice, would not perform his duty and pay a moiety of the fees. It is true, that, if the defendant delayed the payment of his moiety, some inconvenience might be imposed on the plaintiff, inasmuch as he could not obtain the award until the whole was paid, but that inconvenience will not raise a promise to pay. No implied request could arise before payment, and that is made under an award which is void. The money sought to be recovered in this action was clearly not money payable by the plaintiff in the first instance, but by the defendant, and a voluntary payment by the former cannot make it money paid for the defendant's use. The arbitrators could not maintain any action; their only remedy was by withholding the award. But even if the fees were recoverable by the arbitrators, separate actions must have been brought against each party to the submission for his moiety.—Another objection arises from the terms of the submission, by which the costs of the reference and award, including a reasonable compensation to the arbitrators for their trouble, are to be in the discretion of the arbitrators, or any two of them, who are, by their award, to order and direct by whom and to whom and in what proportion and manner the same shall be paid. But the arbitrators only award generally that the costs of the reference and award, including compensation to them for their trouble, shall be paid and borne one moiety thereof by the plaintiff and the other by the defendant. Either the award is void as leaving undecided a matter submitted to the arbitrators, namely, the amount of their compensation;

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or if the award be good, it must be so on one of these two grounds, viz. that the arbitrators must be considered to have waived their fees, or that the amount is ascertainable by the Master on taxation of costs. If the fees are waived, the plaintiff has clearly made a voluntary payment in his own wrong; if the fees are not waived, they cannot be ascertained by reference to the Master; for *Dossett v. Gingell* (a) expressly decided, that the Court has no jurisdiction over fees of arbitrators paid under protest upon taking up an award, but not specified in the award itself. Even assuming that the amount of compensation might be ascertained by the Master, it is sufficient to say that no taxation has yet taken place, and it is altogether uncertain what sum will ultimately have to be paid by each party, as his moiety of the whole costs of the reference. There is very little authority bearing on this question. In *Swinford v. Burn* (b), *Dallas*, C. J., ruled, that the plaintiff, who had paid the whole of the expenses of a reference and award, might recover a moiety from the defendant, but at the same time reserved the point; and it does not appear that any motion was afterwards made. In *Hicks v. Richardson* (c), an attachment was granted against a party to a submission, who refused to pay his moiety of the costs of the arbitration, but that decision is not very satisfactory. [*Parke*, B.—There the proceeding was under the award, the submission having been made a rule of Court.] *Stokes v. Lewis* (d) decided, that an action for money paid, laid out, and expended, will not lie where the money has been paid against the express consent of the party for whose use it is supposed to have been paid. If, in this case, the plaintiff had declared specially, he must have alleged the submission, and an award stating the amount of the arbitrators' fees, and averred that the defendant had notice of the award and refused to pay

(a) 2 Man. & G. 870.

(b) Gow N. P. 7.

(c) 1 Bos. & P. 93.

(d) 1 T. R. 20.

the moiety of costs on request; and that, for the purpose of obtaining possession of the award, the plaintiff was compelled to pay the whole. The declaration would have been bad without an averment of notice and request.

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Cowling, Townsend, Egerton, and Burnie, contra.—By the terms of the submission the parties agree to be bound by the award, and no notice was given that the defendant intended to object to it until two days after the plaintiff had taken it up. The arbitrators direct, that, *as between the parties*, the amount of costs shall be paid in moieties—not that each party shall pay to the arbitrators a moiety; that they leave to be understood according to the usual practice, which is for the one party to pay the whole and recover from the other his moiety. The language used is with reference to the ordinary mode of proceeding. [*Parke, B.*—The question is, whether the plaintiff, by taking up the award, does not stand in the same situation as the arbitrators, and acquire all the rights which they possessed of enforcing payment of their fees. In the case of *Hicks v. Richardson* (a), it was considered by *Eyre, C. J.*, that an arbitrator might recover his fees by attachment; and that case seems to explain how the party taking up the award can be reimbursed, namely, by getting an attachment and standing in the place of the arbitrator. There is no difficulty in saying that these arbitrators are entitled to compensation, because there is an agreement that they shall have it; the only question is, how that is to be enforced. Can an action be maintained the moment the money is paid? if so, it would be a great hardship on the other side.] The case of *Hicks v. Richardson* was approved of by Lord *Ellenborough* in *Stokes v. Lewis* (b). *Swinford v. Burn* (c) shews that *Dallas, C. J.*, thought the action would lie. The present case is not unlike that of a bill of

(a) 1 Bos. & P. 93. (b) 2 Smith, 12. (c) Gow N. P. 7.

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exchange upon which two persons are jointly liable, and where, if one has paid the whole amount, he may recover a moiety from the other. Assuming, then, that the plaintiff might have recovered if the award had been valid and had mentioned the amount of compensation, the non-existence of those circumstances makes no difference. Until the plaintiff took up the award, he had no means of knowing in what proportions the costs were to be paid. Immediately the money is paid he is entitled to contribution, and the common count is applicable.—They also cited *Kemp v. Finden* (a), *Gwynne v. Burnell* (b), *Pitt v. Pursord* (c), *Davies v. Humphreys* (d), *Hoggins v. Gordon* (e), *Prior v. Hem-brow* (f).

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—The only question remaining for consideration in this case was, whether the plaintiff was entitled to recover 12*l.* 14*s.* 9*d.*, a moiety of the sum paid by him in taking up the award, as money paid. There was no pretence to say that the defendant *requested* the plaintiff to pay for him, so as to render himself liable on that account. The ground on which the plaintiff must recover, if at all, is that the defendant had consented that he should be in a situation in which he might be compelled to pay the money on the defendant's account; that he was compelled, and so made the payment by the implied request of the defendant. In order to prove this case, the plaintiff must shew, that both the parties became jointly liable to the arbitrators for the sum that was paid to them, that it was due at the time it was paid, and that the defendant is bound, as between

(a) 12 M. & W. 421.
(b) 6 Bing. N. C. 453.
(c) 8 M. & W. 538.

(d) 6 M. & W. 153.
(e) 3 Q. B. 466.
(f) 8 M. & W. 873.

themselves, to pay a part. Whether the liability was to both the arbitrators jointly, or to each for his portion, (which would have been very material if they brought an action), is now immaterial, as the payment has been made to both.

The first point to be considered is, whether both the parties were jointly liable to the arbitrators to pay them for their trouble. This depends upon the question, whether the arbitrators were parties to the submission, and agreed to be paid on the terms contained in it only. If they were, then they had a remedy only against each for the part which they by their award should direct each to pay, and so this action could not be maintained. It seems to us, however, that the arbitrators were not employed on those terms, though my Lord Chief Baron has a doubt on this point. We think, the submission being expressly by agreement *between the plaintiff and defendant*, they only are parties to the instrument, and there is no contract by it with the arbitrators; and the effect of the agreement is to give power to the arbitrators to decide, *inter se*, in what proportions each party is to be liable to pay the expenses of the reference, including, *inter alia*, the recompense to the arbitrators. This contract of the two parties is *evidence* by their own admission that the arbitrators were to be paid for their trouble, and might be used for that purpose, if the arbitrators had to sue the parties for their services; but it is no agreement between the employers and the employed, binding the latter to this mode of payment.

This being so, both the parties, having jointly employed the arbitrators, would, as between them and the arbitrators, be jointly liable to pay a reasonable compensation, and *when it should* become due: but neither of them would be bound to pay, unless both these circumstances should concur; and, in order to recover contribution, the plaintiff must shew, that by the award a definite portion of this sum was to be paid by the defendant, for the award regulates the proportion *inter se*.

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Now, on referring to my Brother *Coltman's* notes, we find that Mr. *Welsby* objected that some of these conditions were not complied with.

First, that the award was not binding, as the condition of the submission was not performed; and if so, the arbitrators would not be entitled to recover, and the plaintiff not bound to pay, for they could be entitled only if they made a valid award. 'This objection appears to have been answered by evidence of the waiver of that condition; and unless the jury had been satisfied of that, the verdict would not have been found on the account stated. He objected, in the next place, that the costs of the reference were not ascertained by the award, or by the taxation of the Court, the reference being capable of being made a rule of Court. Now this we think a fatal objection.

Without saying whether the remuneration to the arbitrators for their trouble ought to have been ascertained, either by the award or by taxation, the residue of the costs of the reference ought to have been ascertained in one of these ways, before the amount payable by the defendant could be ascertained. All the costs of both sides, as well as the costs of and recompense to the arbitrators, are to be divided by the terms of this award; for the award is not that each party is to pay his own costs of the reference, and one moiety of those of the arbitrators, but one moiety of all brought into hotchpot; so that whether the defendant would have anything to pay, or how much, to the plaintiff, could not be ascertained until then.

Rule discharged.

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*Trial at Bar.**Before PARKE, B., ALDERSON, B., ROLFE, B., and PLATT, B.*

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Feb. 14, 15,
& 16.

TRESPASS.—The first count of the declaration stated, that the plaintiff, during all or any of the time in that count mentioned, was not a subject of the Sovereign of these realms, and so not being such subject as aforesaid, heretofore, to wit, on &c., was lawfully possessed of certain slaves, goods, chattels, effects, &c., then being without the dominions of the Sovereign of these realms, (that is to say), of divers, to wit, 4000 slaves, of great value, to wit, of the value of £100,000, and of divers goods, chattels, effects, (that is to say), &c., and continued so possessed until the defendant afterwards, and whilst the said slaves, goods, chattels, effects, &c. were so respectively without the dominions aforesaid, and whilst the plaintiff was so possessed and was not subject as aforesaid, to wit, on &c., with force and arms, seized, took, and carried away the said slaves, goods, chattels, effects, &c., whereby the same became and were wholly lost to the plaintiff. The second

The defendant, a naval commander, stationed on the coast of Africa, with instructions to suppress the slave trade, was requested by the Governor of Sierra Leone to obtain the liberation of two British subjects detained as slaves at the Gallinas by the son of the king of that country, and in effecting that object to use force, if necessary. He accordingly proceeded to the Gallinas with an armed force, and, having

landed at Dombocorro, took military possession of a barracoen belonging to the plaintiff, who was a Spaniard, carrying on the slave trade at the Gallinas. He then communicated with the king of the country, and the two British subjects having been released, the defendant concluded a treaty for the abolition of the slave trade in that country. In execution of this treaty, the defendant fired the barracoens of the plaintiff, and carried away his slaves to Sierra Leone, where they were liberated. Some of the plaintiff's goods, used in the slave traffic, were claimed by the king as forfeited, and delivered up to him; other goods were destroyed. These proceedings having been communicated to the Lords of the Admiralty, and the Secretaries of State for the foreign and colonial departments, they respectively, by letter, adopted and ratified the act of the defendant:—*Held*, first, that the plaintiff had a property in his slaves, and might maintain trespass for their seizure, the slave trade not being piratical by the law of nations, and it not appearing that Spain had passed any law abolishing the slave trade pursuant to the treaty embodied in the 6 & 7 Will. 4, c. 6.

Secondly, that the ratification of the defendant's act by the ministers of state was equivalent to a prior command, and rendered it an act of state, for which the Crown was alone responsible, (*Parke, B., dubitante*): and that such defence was open under the general issue.

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count stated, that the defendant, on &c., with force and arms, and against the peace of our Lady the Queen, burnt, damaged, and destroyed divers other goods, chattels, and effects of the plaintiff, &c.

The defendant pleaded numerous pleas, of which the following only are material for the present questions :—

First, not guilty.

Second, to the first count, that the plaintiff was not lawfully possessed of the said slaves, goods, chattels, effects, &c., or of any or either of them, modo et formâ.

Fourth, to so much of the first count as relates to the seizing, taking, and carrying away the slaves therein mentioned, that, before the time of the committing of the supposed trespasses, to wit, on &c., a treaty was entered into and concluded between our late Lord the King, William the Fourth, and the Queen Regent of Spain, during the minority of her daughter, Donna Isabella the Second, Queen of Spain, the said parties then having full power to enter into and conclude the said treaty on the part of this kingdom and the kingdom of Spain respectively; and that the said treaty was and is the treaty mentioned and set forth in an act of Parliament passed in the session of Parliament holden in the sixth and seventh years of the reign of his said late Majesty King William the Fourth, intituled “An Act for carrying into effect a treaty made between his Majesty and the Queen Regent of Spain, for the abolition of the slave trade,” and was of the tenor and effect in the recital of the said act set forth; and that afterwards, to wit, on &c., the said treaty was duly ratified, and the ratification thereof exchanged; and that the said treaty, from thence until and at the time when &c., continued, and was and still is in full force and effect, and a much longer time than two months, to wit, five years, from the time of ratifying and exchanging the ratifications of the said treaty, had elapsed, and the said act

of Parliament had been passed and in force, before the said time when &c. And the defendant says, that the plaintiff, at the time of the making and ratifying of the said treaty, and from thence until and at the time when &c., was a subject of and owed allegiance to the kingdom of Spain, and obedience to the laws of that kingdom, and that the slaves in the declaration mentioned were natives of Africa, born free, and reduced to slavery by force and duress, and that the plaintiff, after the said two months had elapsed, and the said act had been passed, and before the said time when &c., to wit, on &c., and on divers days between that day and the said time when &c., though well knowing the premises, had procured, and at the said time when &c. was possessed of the said slaves, against their will, on the coast of Africa north of the equator, for the purpose of carrying on the slave trade therewith, by transporting them from Africa, where, at the said time when &c., they were, and where the supposed trespasses were committed, to certain other places beyond the seas, to wit, the West Indies, to be there sold and used as slaves, contrary to the provisions of the said treaty and in violation thereof; and the plaintiff, at the said time when &c., was about to and would have caused the said slaves to be so transported, sold, and used as slaves, had not the defendant set them free, as hereinafter mentioned: whereupon the defendant, being a subject of this kingdom, and holding the rank of commander in the Royal Navy thereof, and being a commander of a vessel of war, to wit, the "Wanderer," in the naval service thereof, and duly authorised and instructed to carry into effect the provisions of the said treaty, in the manner therein provided, as the servant of her Majesty Queen Victoria, then and still being the Queen of this kingdom, and by her command, did, at the said time when &c., seize, take, and carry away the said slaves, for the purpose of setting them free, and preventing the plaintiff from acting as aforesaid, and violating the said treaty, and did then set them free, using

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no unnecessary violence, and doing no more than was necessary for that purpose: *quæ sunt eadem*, &c.—Verification.

Ninth, to the first count, except as to seizing the slaves, (after stating the treaty, and that the plaintiff was a subject of Spain, in the same terms as in the above plea), that the plaintiff, at the said time when &c., though well knowing the premises, was concerned and employed in carrying on, and did during and at that time carry on the said trade or traffic, contrary to the provisions of the said treaty and in violation thereof, at a certain place on the western coast of Africa north of the equator, and that in the course of his carrying on the said trade or traffic, and for the purpose thereof, the plaintiff, before the said time when &c., to wit, on &c., and on divers days and times between that day and the said time when &c., had caused and procured the said goods, chattels, effects, &c. in the first count mentioned to be imported to the said place on the west coast of Africa, for the purpose and with the intent of using the same in carrying on the said trade or traffic, contrary to the provisions of the said treaty and in violation thereof, to wit, by the exchanging the said goods, chattels, effects, &c. respectively for human beings, and obtaining such human beings in exchange for the same respectively, and of thereupon transporting them, the said human beings so obtained, to certain other parts beyond the seas, to wit, the West Indies, to be there sold and used as slaves, contrary to the provisions of the said treaty and in violation thereof; and that the plaintiff, at the said time when &c., was possessed of the said goods, chattels, effects, &c. at the said place, for the sole purpose of being so used in carrying on the same trade or traffic, to wit, in manner aforesaid; and that the plaintiff was then about and intended to use, and would then have used, the said goods, chattels, effects, &c., in manner and for the purpose aforesaid, in carrying on the said trade or traffic,

contrary to the provisions of the said treaty and in violation thereof, had not the defendant seized, taken, and carried away the same, as hereinafter mentioned: whereupon the defendant, then being a subject of this kingdom, and holding the rank of commander in the Royal Navy thereof, and being the commander of a vessel of war, to wit, the "Wanderer," in the naval service thereof, and duly authorised and instructed to carry into effect the provisions of the said treaty in the manner therein provided, in order to prevent the plaintiff from so using the said goods, chattels, effects, &c., and from violating the treaty aforesaid, and as servant of her Majesty Queen Victoria, then and still being the Queen of this kingdom, and by her command, did, to wit, at the said time when &c., seize, take, and carry away the said goods, chattels, effects, &c., using no more force and doing no more than was necessary for the purpose of preventing the plaintiff from so using the said goods, chattels, effects, &c., contrary to the said treaty, and in violation thereof: *quæ sunt eadem* &c.—Verification.

Fourteenth, to the second count, that the goods, chattels, effects, &c. in that count mentioned were not the goods, chattels, &c. of the plaintiff, *modo et formâ*.

Sixteenth, to the second count, a similar plea to the ninth.

The plaintiff joined issue on the first, second, and fourteenth pleas, and to the fourth replied (*a*), that, though true

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(*a*) The replications to the 4th, 9th, and 16th pleas were originally as follows:—That, at the said time when &c., the said slaves were on land, and at the said place in the said pleas mentioned, being a certain place or country called Gallinas, and not parcel or within the dominions of the Queen of Great Britain

or of the Queen of Spain, or subject to the laws, treaties, or regulations either of Great Britain or of Spain, to wit, on the continent of Africa, and were not, nor were nor was any or either of them, on board any ships or vessels, nor had the same, or any or either of them, been at any time met with or found by the defendant, or by

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it is that the said treaty was entered into and concluded as in that plea mentioned, and that the said treaty was so ratified and the ratifications thereof so exchanged as therein mentioned, and that the said act of Parliament was so passed as therein mentioned, and that the defendant was so holding such rank and was such commander, and duly authorised and instructed, as in that plea mentioned, to carry into effect the provisions of the said treaty in the manner in the said treaty provided, for replication nevertheless the plaintiff saith, that

the said ship of war whereof he was such commander, or by any ship of war or cruiser of her Majesty the Queen of Great Britain or the Queen of Spain, upon or during any voyage, neither had any ship or vessel having the said slaves, or any or either of them, on board thereof, or intended to receive the same, or any or either of them, on board thereof, or from which the same, or any or either of them, had been disembarked, been met with or found by the defendant, or by the said ship of war whereof he was such commander, or by any ship of war or cruiser of her Majesty the Queen of Great Britain or of the Queen of Spain, upon or during any voyage, nor taken or detained, visited or searched, by the defendant or by any officer commanding any ship of either of their said Majesties, under the provisions of the said treaty.—Verification.

To these replications the defendant demurred; and his point for argument was, that the replications admitted an intended violation of the treaty, which the

defendant was justified in preventing.

Sir *T. Wilde* argued in support of the demurrers (5th June and 13th Nov., 1844), and cited the following statutes and cases:—51 Geo. 3, c. 23; 58 Geo. 3, c. 36; 6 & 7 Will. 4, c. 6; *Conway v. Gray*, (10 East, 536); *Johnston v. Sutton*, (1 T. R. 546); *Forbes v. Cochrane*, (2 B. & C. 448); *Madrazo v. Willes*, (3 B. & Ald. 353); *The Amedie*, (1 Dod. 84, n.); *The Donna Marianna*, (1 Dod. 91); *The Diana*, (1 Dod. 95); *Handcock v. Baker*, (2 B. & P. 260).

Sir *F. Kelly* argued for the plaintiff, and cited the following statutes and cases:—5 Geo. 4, c. 113; 6 & 7 Vict. c. 98; *Le Louis*, (2 Dod. 210); Com. Dig. tit. "Pleader," (3 M. 16.)

Sir *T. Wilde*, in reply, cited 47 Geo. 3, sess. 1, c. 36; 5 Geo. 4, c. 113; and 3 & 4 Will. 4, c. 73.

The Court suggested that the replications should be amended by traversing the command of the Queen, which was accordingly done.

the defendant, at the said time when &c., seized, took, and carried away the said slaves without the command of her Majesty Queen Victoria, and not by the command of her said Majesty, modo et formâ, concluding to the country.

There were similar replications to the ninth and sixteenth pleas.

M. D. Hill (a) opened the case on behalf of the plaintiff, and, after adverting to the statutes 58 Geo. 3, sess. 1, c. 36, and 6 & 7 Will. 4, c. 6, relied upon the case of *Madrazo v. Willes* (b) as an express authority to shew that a foreigner, who is not prohibited from carrying on the slave trade by the laws of his own country, may, in a British court of justice, recover damages sustained by him in respect of the wrongful seizure, by a British subject, of a cargo of slaves on board a ship then employed by him in carrying on the African slave trade.

The following facts were proved in evidence:—The plaintiff was a Spaniard, who carried on the slave trade at the Gallinas, on the western coast of Africa, north of the equator. He possessed barracoons or factories at Kamasura, Chicore, Dombocorro, Etaro, and other places in the Gallinas. The defendant held the rank of commander in the Royal Navy, and in March, 1840, had been placed, as senior officer, in charge of a part of the coast of Africa lying between Capes Verde and Palmas, with instructions to suppress the slave trade. Whilst so engaged, he received a letter dated the 30th of October, 1840, from Colonel Sir Richard Doherty, the then Governor of Sierra Leone, requesting him to take measures for the immediate liberation of a negro woman named Fry Norman, and her child, British subjects belonging to Sierra Leone, who were detained

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(a) *M. D. Hill, Martin, and Cockburn, and Willes*, for the defendant.
The Attorney-General, Godson, (b) 3 B. & Ald. 363.

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as slaves at the Gallinas by Prince Manna, the eldest son of King Siacca, the negro sovereign of that country. This letter contained the following passage:—"But should it be found impossible to effect this object without resorting to force, you will employ force as far as may be necessary, and as your orders and the rules of your service may permit. Should circumstances require it, I shall be prepared to assist you, to the extent of my ability, with a military party from this garrison, or in such other manner as may appear to you advisable." Accordingly, on the 19th of November, 1840, the defendant, having previously issued a "general order" respecting the expedition, entered the Gallinas river with the British vessels "Wanderer," "Rolla," and "Saracen," and an armed force of about 120 men. Observing that the Spaniards were carrying off in their canoes a number of slaves, the defendant chased them, and succeeded in capturing about ninety, amongst whom were two British subjects, named John Fraser and John Parker. The defendant landed at Dombocorro, and, having taken possession of the plaintiff's barracoons, spiked the guns and placed sentinels at the doors. At this time the government of the Gallinas consisted of King Siacca, his eldest son Prince Manna, and three chiefs of the name of Rogers. The defendant wrote to King Siacca, demanding the liberation of Fry Norman and her child, and complaining of the conduct of the Spaniards in carrying on the slave trade. Several letters having passed, the woman, Fry Norman, and her child were delivered up; and on the 21st of November, 1840, the following treaty was concluded and signed by the defendant, and Prince Manna on behalf of King Siacca (who was bedridden from old age), and the chiefs of the country:—

"In consequence of the white slave-dealers settled in the river Gallinas having prevented the boats of her Britannic

Majesty's ships from receiving the common rights of humanity when in distress and seeking refuge in King Siacca's waters, in violation of his dignity and of his rights, thus exposing him to differences with the Queen of England; and also in consequence of a Sierra Leone boy having been made a slave of by these men at the river Gallinaas, who was discovered and released by Commander Denman on the 19th inst.—

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"1st. King Siacca engages totally to destroy the factories belonging to these white men without delay.

"2nd. King Siacca engages to give up to Commander Denman all the slaves who were in the barracoons of the white slave-dealers when he entered the river, and have been carried off into the bush.

"3rd. King Siacca engages to send these bad white men out of his country by the first opportunity, and within one month from this date.

"4th. King Siacca binds himself in the most solemn manner that no white men shall ever for the future settle in his country for the purpose of slave trading.

"5th. Commander Denman, upon the part of her Britannic Majesty, promises never to molest any of the legitimate commerce of the Gallinas; but that, on the contrary, her ships shall afford every assistance to King Siacca's subjects, and take every opportunity of promoting his commerce.

"6th. The Governor of Sierra Leone will use his influence to get the Sierra Leone people to open the trade with King Siacca's country.

"7th. No white men from Sierra Leone shall settle down in King Siacca's country without his full permission and consent.

"8th. All complaints that King Siacca may have to make hereafter concerning any of her Majesty's ships, he is requested to forward at once to Sierra Leone; and a full investigation, and such redress as the occasion may require,

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is solemnly promised by Commander Denman on the part of her Britannic Majesty.

“Done at Dombocorro, in the river Gallinas, this 21st day of November, 1840.

“PRINCE MANNA × (mark).

“LICOMI ROGERS × (mark).

“JOHN SILIPHI ROGERS × (mark).

“Signed, Jos. DENMAN, Commander and Senior Officer on the Sierra Leone station.”

On the 23rd of November, the defendant, in the execution of this treaty, commenced burning the plaintiff's barracoons. On one occasion, at the request of Prince Manna, the defendant with his own hand fired two rockets, which burnt the barracoons at Kamasura. The defendant also set fire to the village of Chicore, by which the plaintiff's barracoons in that place were destroyed. Before the expedition landed, there were about 300 slaves in these barracoons, besides great quantities of cotton and woollen goods, gunpowder, spirits, and goods of various descriptions adapted for slave traffic. On the approach of the expedition, the slave-dealers deserted the factories, and let loose the slaves, who were driven up the country. Great numbers of these slaves were afterwards taken by the defendant and carried to Sierra Leone, where they were emancipated. The goods were claimed by King Siacca, as forfeited in consequence of the owner having acted in defiance of his law, and were delivered up to him; the gunpowder was thrown into the river; and the casks of spirits were broken in, and the spirits allowed to flow away on the sand, it being suggested that they were poisoned. The defendant continued to fire the barracoons until the 26th, (that at Dombocorro being the last destroyed), when he re-embarked and proceeded to Sierra Leone, having succeeded in liberating 841 slaves. On the 28th the defendant wrote to the Governor of Sierra Leone a detailed account of these proceedings at the Galli-

nas. The Governor of Sierra Leone forwarded to Lord John Russell, then being her Majesty's principal Secretary of State for the Colonial Department, a despatch dated the 7th of December, 1840, inclosing the defendant's account of these proceedings. A report was also sent by the defendant to Captain Tucker, the senior officer of her Majesty's ships and vessels on the western coast of Africa, who forwarded the same to the Lords Commissioners of the Admiralty. On the 17th of March, 1841, the following letter, signed by the Under-secretary of the Colonial Department, was sent, by the direction of Lord John Russell, to the Foreign Office, addressed to one of the under-secretaries, Viscount Palmerston then being her Majesty's principal Secretary of State for the Foreign Department:—

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“ Downing Street.

“ Sir,—I am directed by Lord John Russell to transmit to you herewith, for the information of Viscount Palmerston, copies of two despatches, and of their inclosures, which have been received from the preceding and present governors of Sierra Leone: the former reporting the proceedings of Commander the Honourable Joseph Denman, in the Gallinas, by which that officer has effected the recovery of two of her Majesty's subjects from captivity, the destruction of eight slave factories, and the liberation of 841 slaves; and the latter despatch reporting the circumstances under which a slave-dealer named Canot has surrendered himself and 104 slaves. I am to request, that, in laying these papers before Viscount Palmerston, you will state to his Lordship that Lord John Russell proposes to present them to Parliament, by command of her Majesty, omitting only certain passages relating to Canot; and that, with his Lordship's concurrence, Lord John Russell further proposes to convey to the Governor of Sierra Leone his entire approbation of Colonel Doherty's conduct in urging the interposition of her Majesty's naval officers on behalf

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of the woman and child who were detained in the Gallinas; and, secondly, to represent to the Lords Commissioners of the Admiralty, that her Majesty's government entertain a high sense of the very spirited and able conduct of Commander Denman, and its important results to the interests of humanity. I am, sir, &c.,

"J. Backhouse, Esq.

"JAMES STEPHEN."

On the 23d March, 1841, Sir John Barrow, one of the secretaries of the Admiralty, by command of the Lords Commissioners, transmitted to the Foreign Office a copy of the defendant's letter to the senior officer of her Majesty's ships on the western coast of Africa, to which the following reply was sent, signed by one of the under-secretaries of the Foreign Department:—

"[*Slave Trade.*]

"Foreign Office, April 6, 1841.

"Sir,—I am directed by Viscount Palmerston to acknowledge the receipt of your letter of the 23d ult., inclosing a copy of a letter from Commander the Honourable Joseph Denman, reporting his proceedings on the coast of Africa in putting down the slave trade. I am to request that you will state to the Lords Commissioners of the Admiralty, that Lord Palmerston is of opinion that the conduct of Commander Denman, in his proceedings against the slave factories at the Gallinas, ought to be approved. And I am to add, that Lord Palmerston would recommend that similar operations should be executed against all the piratical slave trade establishments which may be met with on parts of the coast not belonging to any civilised power. The course pursued by Captain Denman seems to be the best adapted for the attainment of the object in view; and the commanding officers of such of her Majesty's cruisers as may be employed in such duties should endeavour to obtain the formal permission of the native chiefs for the destruction

of the slave factories within their territories, leaving to those chiefs all the merchandize which may be stored up in those factories, the British officers contenting themselves with destroying the factories, and conveying to Sierra Leone any slaves that may be found in them. I am, &c.,

“ J. BACKHOUSE.”

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On the 7th April, 1841, the following letter was sent from the Colonial Office to the Admiralty, addressed to one of the under-secretaries :—

“ Downing Street.

Sir,—I am directed by Lord John Russell to transmit to you herewith inclosed copies of one despatch, and of its inclosures, and an extract of another despatch, with copy of its inclosure, which have been received from the preceding and present governors of Sierra Leone, reporting the proceedings of Commander the Honourable Joseph Denman at the Gallinas, by which that officer has effected the recovery of two of her Majesty's subjects, the destruction of eight slave factories, and the liberation of 841 slaves ; and I am to request that you will lay these papers before the Lords Commissioners, and move their Lordships to express to Commander Denman the high sense which her Majesty's government entertain of his very spirited and able conduct at the Gallinas, and of its important results to the interests of humanity.

“ I am further directed to request that you will move the Lords Commissioners to instruct the officers commanding her Majesty's ships and vessels on the western coast of Africa, that it is the opinion of her Majesty's government, that operations similar to those undertaken by Commander Denman at the Gallinas should be executed against all the piratical slave trade establishments which may be met with on parts of the coast not belonging to any civilised power. I am, &c.,

“ JAMES STEPHEN.

“ R. More O'Ferrall, Esq., M.P.”

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On the 28th July, 1841, the following letter was sent from the Foreign Office to the Admiralty, addressed to one of the under-secretaries:—

“ Sir,—I am directed by Viscount Palmerston to acknowledge the receipt of your letter of the 14th instant, transmitting copy of Commander Denman’s report of his proceedings at the Gallinas in November last.

“ I am to request that you will state to the Lords Commissioners of the Admiralty, that Lord Palmerston is of opinion that the proceedings of Commander Denman on the occasion in question were highly meritorious, and that it is extremely desirable that a similar course should be pursued in other places along the coast of Africa, not being possessions of any European power, at which slave trade factories have been established.

“ Lord Palmerston conceives there can be little doubt, that, in all such cases, an agreement might be made with the native chiefs similar to that which was made by Commander Denman with the Gallinas chiefs; but if such an agreement should in any case be found impossible, the commanders of her Majesty’s cruisers would be perfectly justified in considering European slave traders established in the territory of the native chiefs as persons engaged in a piratical undertaking; and the British commander would be warranted in landing and destroying the barracoons, and the goods contained in them, and in liberating and carrying off to Sierra Leone the slaves whom they might find therein.

“ Lord Palmerston is of opinion, however, that it would be necessary, in such cases, that full and complete proof should be recorded that the buildings and property destroyed were employed for slave trade, in order that her Majesty’s government might be able to give an indisputable answer to any application which might at any time be made on behalf of the slave traders, upon the false pretence that they were men engaged in legal commerce.

“ I am, &c.,

“ LEVESON.”

The above letters were referred to in the margin as annexes to the following letter from Lord Aberdeen, then Secretary of State for Foreign Affairs, to the Lords of the Admiralty, and were read, together with that letter, as part of the plaintiff's evidence:—

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“ Foreign Office, May 20, 1842.

“ My Lords,—I beg to call your attention to the subject of the instructions given to her Majesty's naval officers employed in suppressing slave trade on the coast of Africa, and to the proceedings which have taken place with reference thereto, as detailed in the papers named in the margin of this letter. Her Majesty's Advocate-General, to whom these papers have been submitted, has reported that he cannot take upon himself to advise that all the proceedings, described as having taken place at Gallinas, New Cestos, and Sea Bar, are strictly justifiable, or that the instructions of her Majesty's naval officers, as referred to in these papers, are such as can with perfect legality be carried into execution. The Queen's Advocate is of opinion, that the blockading rivers, landing and destroying buildings, and carrying off persons held in slavery in countries with which Great Britain is not at war, cannot be considered as sanctioned by the law of nations or by the provisions of any existing treaties; and that, however desirable it may be to put an end to the slave trade, a good, however eminent, should not be obtained otherwise than by lawful means. Accordingly, and with reference to the proceedings of Capt. Nurse at Rio Pengas, on the 28th April, 1841, as well as to letters addressed from this department to the Admiralty on the 6th April, the 1st and 17th June, and the 28th of July of last year, I would submit to the consideration of your Lordships, that it is desirable that her Majesty's naval officers employed in suppressing the slave trade should be instructed to abstain from destroying slave factories and carrying off persons held in slavery, unless the power, upon

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whose territory or within whose jurisdiction the factories or the slaves are found, should, by treaty with Great Britain or by formal written agreement with British officers, have employed her Majesty's naval forces to take these steps for the suppression of the slave trade; and that if, in proceeding to destroy any factory, it should be found to contain merchandise or other property which there may be reason to suppose to belong to foreign traders, care should be taken not to include such property in the destruction of the factory. With respect to that, the terms 'blockade' and 'blockading' have been used by British naval officers when adverting to the laudable practice of stationing cruisers off the slave-factory stations, with a view the better to intercept vessels carrying on slave trade, contrary to treaties between Great Britain and the powers to which such vessels belong; but as the term 'blockade,' properly used, extends to an interdiction of all trade, and indeed all communication, with the place blockaded, I beg leave to submit for your Lordships' consideration whether it will not be proper to caution her Majesty's naval officers upon this head, lest, by the inadvertent and repeated use of the term 'blockade,' the exercise of the duty confided to British officers in suppressing slave trade might by any one be confounded with the very different one of actual blockade. "I have, &c.,

" ABERDEEN."

The correspondence relating to these proceedings was laid before Parliament, and by the 10 & 11 Vict. c. 107, a sum of £7500 was appropriated for the suppression of the slave trade on the coast of Africa, £4000 of which was voted to the defendant and his men for their services at the Gallinas. The present action was commenced in the year 1842.

The Attorney-General.—With respect to the plea denying the plaintiff's property in the slaves, it is submitted

that the plaintiff is bound to prove his right. It is true, that, by the municipal law, persons may have a property in slaves; but every one being of natural right free, the onus of shewing such a property is cast on the party who claims it. This subject is fully discussed by Chancellor *Kent* in his Commentaries (a), where, after adverting, amongst other cases, to that of *The Antelope* (b), decided in the Supreme Court of the United States in the year 1825, he thus states the result:—"The doctrine in the case of *The Antelope* and in the English cases therein referred to, is, that a right of bringing in for adjudication in time of peace foreign vessels engaged in the slave trade and captured on the high seas for that cause, did not exist; and vessels so captured would be restored, unless the trade was also unlawful and prohibited by the country to which the vessel belonged; and if a claim be put in for Africans as slaves and property, the onus probandi is thrown upon the claimant to make specific proof of the individual proprietary interest, according to the laws of the country to which the vessel belongs." At one time, indeed, it was supposed that the slave trade was piratical and illegal by the common law of nations; that doctrine, however, was qualified in the case of *Le Louis* (c). The decision in *Madrazo v. Willes* (d), which is relied upon by the plaintiff, turned on the words of the treaty of 1817, by which Spain declared the slave trade illegal, but at the same time reserved to herself the right of trafficking in slaves within her own dominions. That is provided against by the treaty of the 28th June, 1835, embodied in the 6 & 7 Will. 4, c. 6; by the first article of which "the slave trade is again declared on the part of Spain to be thenceforward totally and finally abolished in all parts of the world." By Article II, "Her Majesty the Queen-

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(a) Vol. 1, pp. 191, 200, 4th edit.

(b) 10 Wheaton Rep. U. S. 66.

(c) 2 Dod. 210.

(d) 3 B. & Ald. 353.

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Regent of Spain, during the minority of her daughter, Donna Isabella the Second, engages that, immediately after the exchange of the ratifications of the present treaty, and from time to time afterwards as it may become needful, her Majesty will take the most effectual measures for preventing the subjects of her Catholic Majesty from being concerned, and her flag from being used, in carrying on in any way the trade in slaves; and especially that, within two months after the said exchange, she will promulgate throughout the dominions of her Catholic Majesty a penal law, inflicting a severe punishment on all those her Catholic Majesty's subjects who shall, under any pretext whatsoever, take any part whatever in the traffic in slaves." It is said that the defendant must prove an act of state carrying out the treaty; but that is not necessary. If the Crown, acting on behalf of the people, makes a treaty, no subject has a right to bring an action for anything done in pursuance of that treaty, whether sanctioned by the municipal law or not; for his assent is virtually implied to every act of his own government: *Conway v. Gray* (a).

Secondly. The documents adduced in evidence prove the issues raised on the fourth, ninth, and sixteenth pleas. On the 6th and 7th of April and 28th of July, 1841, two of the principal Secretaries of State expressed their approval of the defendant's conduct; and, as the Crown can do no act except through its responsible advisers, their approval is equivalent to the Queen's command. It is not necessary that the command should be antecedent to the act done. In the case of *The Rolla* (b), where an American ship and cargo were proceeded against for a breach of the blockade of Monte Video imposed by the British commander Sir Home Popham, without any communication with his government, Lord *Stowell*, in delivering judgment, says:

(a) 10 East, 536.

(b) 6 Rob. 364.

“However irregularly he may have acted towards his own government, the subsequent conduct of Government, in adopting that enterprise, by directing a further extension of that conquest, will have the effect of legitimating the acts done by him, so far at least as the subjects of other countries are concerned.” In *Best on Presumptions of Law and Fact* (a), it is stated to be “a fixed principle, that every ratification has relation back to the time of the act done—*Omnis ratihabitio retrotrahitur et mandato æquiparatur.*” Many authorities to the same effect are collected in a note to the case of *Potter v. North* (b), where, treating of the authority of a bailiff to distrain, it is said: “It is sufficient for the defendant in his cognizance to say generally ‘as bailiff of J. S.,’ without shewing his authority; and a subsequent agreement by J. S. to the distress amounts to an authority, as much as if he had previously directed the defendant to distrain: Bro. *Traverse*, 3; 4 Mod. 378, *Lamb v. Mills*; 11 Mod. 112, *Trevillian v. Pine*. Therefore, if he makes cognizance as bailiff to the King, he need not allege a patent; Bro. *Bailiff*, 2; or to a corporation, he need not allege a deed, or say it was by their command: 3 Lev. 107, *Manby v. Long*.” The effect of this ratification by the Crown was to render the defendant’s act an act of state, in respect of which no action can be maintained: *Elphinstone v. Bedreechund* (c).

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M. D. Hill.—Assuming that there was a ratification, it will not support the issues raised on the Queen’s command. The principle on which the “ratihabitio” has proceeded is, that it is part of the law of principal and agent, and it has never been used for the protection or justification of the agent, but where the act done is founded on a right existing in the principal, and not in the agent except as

(a) Page 28.

(b) 1 Saund. 347 c.

(c) 1 Knapp, 316.

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authorised by the principal. The fiction which carries back the ratification, and gives it the force and operation of a prior command, is, like other legal fictions, in favour of justice. The question between the parties is not whether the agent had a right to do the act, but whether it ought to have been done at all; and, therefore, if the principal had a right to do it, the agent is empowered to vouch his subsequent ratification. That principle is now attempted to be used in a manner which neither reason, justice, nor analogy drawn from authority can justify. It is not for the purpose of shewing that the act was justifiable, but for the purpose of protecting the party committing it against examination as to whether it was right or wrong. It is said that this is an act of state, for which the Crown is alone responsible, and not a matter to be tried by the municipal law. But there has been no publication of the act in the Gazette, by which the Queen of Spain could be informed of the proper mode of seeking redress for this injury to one of her subjects.

Secondly. There has been no ratification. It does not appear that the letters of the Secretaries of State were written by authority under the Great Seal, which is necessary to render the Crown responsible for an act like the present, which gives a *casus belli* to the Queen of Spain. Indeed, it does not appear that the matter was in any way submitted to the Queen. The Court will not presume a ratification, the effect of which would be to make the Crown responsible for a violation of the law of nations towards a friendly power.

PARKE, B., (in summing up).—With respect to the issue, whether the plaintiff was possessed of these slaves, your verdict must be for the plaintiff. The law on the subject of slaves has been settled by the case of *Le Louis*(a), which has been referred to. That case was decided, in the

(a) 2 Dod. 210.

year 1817, by Sir *William Scott*, who went fully into the question of the legality of the slave trade, and laid down certain positions, which have since been acquiesced in both in this country and abroad. Those positions are, first, that dealers in slaves are not pirates by the law of nations, and can only be made so by and according to the terms of a treaty with the country to which they belong prohibiting the slave trade; secondly, that trading in slaves is not a crime by the law of nations; thirdly, that the right of stopping and searching ships in time of peace is not a right which can belong to any nation except by contract with the nation to which such ships belong; and, fourthly, that if there be a law in a particular country prohibiting the slave trade, it is not open to every one to punish the offender against that law, but proceedings must be taken in the tribunals of his own country. Those propositions being clear, a question arises, whether the plaintiff can maintain this action for taking away his slaves. It is not necessary to decide whether, if he had been simply in the actual possession of slaves, using them as slaves, he could have recovered against any person who took them away: on that point it is not necessary to give an opinion, because, according to the evidence on both sides, he was living at Gallinas, where it was lawful to possess slaves. It is contended that, by the law of Spain, the plaintiff cannot possess a property in slaves for the purpose of exporting them, *as slaves*, to the West Indies. However, there is no evidence of such law, and we are all, therefore, of opinion that the second and fourteenth issues, both as to the slaves and the goods, must be found for the plaintiff.

The principal question is, whether the conduct of the defendant, in carrying away the slaves, and committing the other alleged trespasses, can be justified as an act of state, done by authority of the Crown. It is not contended that there was any previous authority. If the defendant had merely instructions according to the terms of the treaty set

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out in the act of Parliament, those instructions would only have extended to the stopping of ships in the high seas, within the limits agreed to by the treaty with the Spanish crown. Therefore, the justification of the defendant depends upon the subsequent ratification of his acts. A well-known maxim of the law between private individuals is, "*Omnis ratihabitio retrotrahitur et mandato æquiparatur.*" If, for instance, a bailiff distrains goods, he may justify the act either by a previous or subsequent authority from the landlord; for, if an act be done by a person *as agent*, it is in general immaterial whether the authority be given prior or subsequent to the act. If the bailiff so authorised be a trespasser, the person whose goods are seized has his remedy against the principal. Therefore, generally speaking, between subject and subject, a subsequent ratification of an act done *as agent* is equal to a prior authority. That, however, is *not* universally true. In the case of a tenant from year to year, who has, by law, a right to a half-year's notice to quit, if such notice be given by an agent, without the authority of the landlord, the tenant is not bound by it. Such being the law between private individuals, the question is, whether the act of the Sovereign, ratifying the act of one of his officers, can be distinguished. On that subject I have conferred with my learned brethren, and they are decidedly of opinion that the ratification of the Crown, communicated as it has been in the present case, is equivalent to a prior command. I do not say that I dissent; but I express my concurrence in their opinion with some doubt, because, on reflection, there appears to me a considerable distinction between the present case and the ordinary case of ratification by subsequent authority between private individuals. If an individual ratifies an act done on his behalf, the nature of the act remains unchanged, it is still a mere trespass, and the party injured has his option to sue either; if the Crown ratifies an act, the character of the act becomes altered, for the ratification does not give the party injured the double op-

tion of bringing his action against the agent who committed the trespass or the principal who ratified it, but a remedy against the Crown only (such as it is), and actually exempts from all liability the person who commits the trespass. Whether the remedy against the Crown is to be pursued by petition of right, or whether the injury is an act of state without remedy, except by appeal to the justice of the state which inflicts it, or by application of the individual suffering to the government of his country, to insist upon compensation from the government of this—in either view, the wrong is no longer actionable. I do not feel so strong upon the point as to say that I dissent from the opinion of my learned brethren; therefore, you have to take it as the direction of the Court, that if the Crown, with knowledge of what has been done, ratified the defendant's act by the Secretaries of State or the Lords of the Admiralty, this action cannot be maintained. In the documents which have been read there is ample evidence of ratification, for the Secretary of State for Foreign Affairs, the Lords of the Admiralty, and the Secretary of State for the Colonial Department, on receiving the report of the Governor of Sierra Leone, and the account of the transactions given by the defendant himself, expressed their approbation of what he had done. The acts, indeed, have never been published, and that is one of the circumstances which created a doubt in my mind. But, although the ratification was not known before this action was commenced, that fact makes no difference in the opinion of the Court. A previous command would be unknown, if given verbally; and a subsequent ratification, though unknown, will have the same effect.

It is argued, on the part of the plaintiff, that the Crown can only speak by an authentic instrument under the Great Seal, and that, therefore, the ratification ought to have been under the Great Seal. We are clearly of opinion, that, as the original act would have been an act of the Crown, if communicated by a written or parol direction from the

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Board of Admiralty, so this ratification, communicated in the way it has been, is equally good. I should observe that the Court are of opinion that it is not necessary for the defendant to prove the pleas which expressly state the authority of the Crown; for if this act, by adoption, becomes the act of the Crown, the seizure of the slaves and goods by the defendant is a seizure by the Crown, and an act of state for which the defendant is irresponsible, and, therefore, entitled to a verdict on the plea of "Not guilty."

The jury found that the Crown had ratified the act of the defendant, with full knowledge of what he had done, whereupon a verdict was taken for him on the 4th, 9th, and 16th pleas. A verdict was found for the plaintiff on the pleas of not possessed of the slaves and goods; and the plea of "Not guilty" was entered, by consent, for the plaintiff.

F. Robinson tendered a bill of exceptions to the above ruling; but the plaintiff afterwards obtained an order to discontinue, certain terms of settlement of this and other similar actions having been agreed to.

MEMORANDUM.

In this vacation, Sir *David Dundas* resigned the office of her Majesty's Solicitor-General, and was succeeded by *John Romilly*, Esq., one of her Majesty's counsel, who subsequently received the honour of Knighthood.

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POTEZ v. GLOSSOP.

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ASSUMPSIT.—The first count of the declaration was on a bill of exchange for £250, of the 28th of August, 1846, payable four months after date, drawn by one Gardener upon and accepted by the defendant, indorsed by Gardener to one Gadderer, and by him indorsed to the plaintiff. Plea (amongst others), in substance, that the bill was drawn and accepted for a special purpose, viz. that the drawer would get it discounted, and pay the proceeds to the defendant; that from the time of such acceptance, until it was indorsed to Gadderer, Gardener held it on those terms, and that the defendant never received any consideration for it; that Gardener did not get it discounted, but indorsed it without the defendant's consent to Gadderer, who, before and at the time of such indorsement, knew that the bill was held for the special purpose aforesaid; that the plaintiff had notice of the premises before it was indorsed to her, and that neither had Gadderer or the plaintiff, before such notice, any right or title to have the bill indorsed to them. **Verification.**—There was also a plea, that the defendant's acceptance was obtained by fraud and covin, &c., of which both Gadderer and the plaintiff had notice before they acquired any title to the bill. **Verification.**—The plaintiff

The date a letter bears is *prima facie* its true date.

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replied *de injuriâ* to these pleas, upon which issue was joined. At the trial of the cause, before *Pollock*, C. B., at the Middlesex sittings after Trinity Term, 1847, it appeared that the defendant had been induced to accept the bill in question on the faith of an advertisement in the newspapers, which offered loans of money upon favourable terms, and upon the understanding that the bill would be discounted, and that he should receive the proceeds. He did not, however, ever receive any money on account of the bill. It was proposed on the part of the defendant to read certain letters from *Gadderer* to the defendant, to shew that whilst the bills were in *Gadderer's* hands, and before they were indorsed to him, he knew the terms upon which the defendant had accepted the bill. It was thereupon objected on the part of the plaintiff, that there was nothing to shew the time when these letters were written; that the dates of the letters could not be taken as any evidence of that fact, unless the letters could be connected with the envelopes in which it was contended they had been sent, and which bore a postmark; and that they were not admissible as against the plaintiff, who was a stranger. The Lord Chief Baron rejected the letters. The plaintiff obtained a verdict for a portion of the demand.

Cockburn having obtained a rule nisi for a new trial, on the ground that these letters were improperly rejected,

Montagu Chambers, *Miller*, and *G. Pollock* now shewed cause.—The letters in question were properly rejected, as there was no evidence of the time when they were written. If they were written after the bill was indorsed, they would be immaterial. If the defendant relied upon the dates, the letters should have been in some way connected with envelopes which bore a postmark, or the party who wrote them should have been called to prove the time when they were written. [*Parke*, B.—There is a case which shews that the date of a letter is *primâ facie* evidence of the time it was

written. He referred to *Anderson v. Weston* (a)]. The rule there laid down cannot be taken to extend to cases of letters written by strangers, and not by the parties to the suit. In the case of a promissory note, signed by a bankrupt before the bankruptcy, it has been held that the note is not sufficient per se to support the commission, but that it must be proved to have been in existence before the bankruptcy. [*Parke, B.*, referred to *Wright v. Lainson* (b); *Smith v. Battens* (c).] As against the parties in the suit the rule appears to be reasonable; but it would be a dangerous doctrine to hold that those parties are to be affected by the date of a letter written by a stranger. In *Sinclair v. Baggaley* (d), the date of a statement of accounts, shewing a balance to a creditor, and signed by the bankrupt before the bankruptcy, was held to be *prima facie* evidence of the date when it was written, as against the assignees. In *Smith v. Battens* (e), which was an action by executors on a promissory note made to the deceased, the dates of the indorsements made by the deceased were held to be written at the time they bore date. And upon the same principle, *Littledale, J.*, in *Barough v. White* (f), said, "It is a general rule, that where a person is living, and can be called as a witness, his declarations made at another time cannot be received in evidence. . . . To this there are exceptions; for instance, where the party making the declarations can be identified with him against whom they are offered."

Cockburn and *Humfrey*, in support of the rule.—These letters were clearly admissible. The cases of *Sinclair v. Baggaley* (g), and *Anderson v. Weston*, are the solemn and express decisions of two Courts upon this identical point,

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| (a) 6 Bing. N. C. 300; 8 Scott, 583. | (d) 4 M. & W. 312. |
| (b) 2 M. & W. 739. | (e) 1 Moo. & Rob. 341. |
| (c) 1 Moo. & Rob. 341. | (f) 4 B. & C. 328. |
| | (g) 4 M. & W. 312. |

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viz. that the date of an instrument is *primâ facie* evidence of the time when it was written. The same point was ruled in *Smith v. Battens* (a). [*Parke*, B., referred to *Edwards v. Crock* (b).] This Court, being one of co-ordinate jurisdiction only, is bound by these two decisions: *Wagstaff v. Sharpe* (c). A deed of thirty years old proves itself. [*Pollock*, C. B.—The principle there rests upon the antiquity of the instrument, as taken with its proper custody. He referred to the *Bishop of Meath v. Marquis of Winchester* (d)]. If the dates of these letters are to be considered as *primâ facie* evidence of the time when they were written, they were clearly admissible in order to support an allegation in the pleas, viz., that Gadderer had notice of the terms upon which the bill was accepted. If he had such notice, he had no title to the bill. [*Parke*, B.—It is proof positive, if contemporaneous with the indorsement.]

POLLOCK, C. B.—I am of opinion that this rule ought to be made absolute. With deference to the authorities which have been cited on the part of the defendant, I am forced to the conclusion that these letters ought not to have been rejected, on the ground that the dates they bore were not *primâ facie* evidence of the time when they were written. The use of envelopes is now very generally adopted, and to misdate a letter would certainly be something in the nature of a fraud.

PARKE, B.—I agree that this rule ought to be made absolute. The letters were clearly relevant to a material allegation in the plea, namely, that Gadderer had notice of the terms of the acceptance. As to the question with regard to the dates, it is a difficult matter to support those cases of *Sinclair v. Baggeley* and *Weston v. Anderson* to their full extent, and yet at the same time it is an equally difficult matter not to be bound by them. It has certainly been held by the

(a) 1 Moo. & Rob. 341.

(b) 4 Esp. 39.

(c) 3 M. & W. 525.

(d) 3 Bing. N. C. 183; 3 Scott, 561.

Court of Common Pleas to be a settled matter, but that there is an exception with respect to the date of a bill of exchange or promissory note, produced for the purpose of proving a petitioning creditor's debt, to support a fiat in bankruptcy. If that be so, I feel great difficulty in seeing the reason of that exception. We, however, feel ourselves bound by those decisions which have been cited. The present question, therefore, must be decided by another tribunal, and the proper course will be to raise it by a bill of exceptions. In the case of *Davies v. Lowndes (a)*, Lord Denman, C. J., in delivering the judgment of the court of error, says, "It was objected, however, on the part of the defendant in error, that, supposing the pedigree or some part of it to be otherwise admissible, it was rendered inadmissible by having been written or assented to post litem motam. To this it was answered that the instrument was dated by William Lloyd, in 1733, and that this could not be a lis mota before September, 1772, when the testator died; that an instrument must be presumed *primâ facie* to have been written when it bears date; for which the cases of *Anderson v. Weston*, and *Smith v. Battens*, were cited as authorities; at all events, that such was the rule with respect to instruments dated thirty years or upwards, the custody of which was accounted for. The latter argument appears to be well founded; and as this document falls within that description, we think it clear that the objection of *lis mota* does not apply to it, so far as it rests upon the admission of William Lloyd." That Court therefore did not rest the case upon the doctrine laid down by the Common Pleas, but on the other ground, viz. that the deed was more than thirty years old, and had come from the proper custody.

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ROLFE, B.—I am of the same opinion. I wish to make one observation only, which is, that the rule respecting the date of a deed which is thirty years old stands upon a

(a) 7 Scott, N. R. 213.

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different footing. Inasmuch as in the nature of human affairs it would of necessity be impossible in many cases to prove the date of an instrument of that age, it therefore became necessary for the security of mankind to draw a line. The time might be for only twenty-five years, or for more than thirty; but being thereabout, for that reason the line was drawn.

PLATT, B., concurred.

Rule absolute (a).

(a) *LEWIS v. SIMPSON*.—T. T., 1848, (June 1).—In this case the same question arose. The Court said that they held themselves bound by the preceding case, and the rule for a new trial, on the ground that certain letters were improperly rejected, was made absolute.

also the same point was discussed, when the Court stated that they felt themselves bound by the two preceding cases, but that they entertained strong doubts upon the matter. The Lord Chief Baron said that he had invited a bill of exceptions when the objection was raised to the admission of the letters at the trial; and the Court discharged the rule for a new trial.

ANGELL v. WORSLEY.—H. T., 1849, (Jan. 25).—In this case

May 10.

JOSEPH KERFOOT, Executor &c., v. EDWARDS.

A defendant has the same time for pleading in *abatement* after oyer granted of an instrument stated in the declaration, as he had at the time of the demand of oyer.

THIS was an action of assumpsit, brought by the plaintiff, as executor of James Kerfoot, deceased, on a promissory note given by the defendant to the testator. The declaration, which made profert of the letters testamentary in the usual terms, was delivered on the 7th of April; on the 8th, the defendant demanded oyer of the letters testamentary; on the 11th oyer was granted; and on the 13th the defendant delivered a plea in abatement, setting out the letters testamentary on oyer (by which it appeared that James Kerfoot, jun., was co-executor with the plaintiff), and pleading the non-joinder of James Kerfoot, jun., as a plaintiff. The plaintiff took out a summons to set

aside the plea, on the ground that it was delivered too late, which was heard on the 15th and dismissed. The plaintiff then gave notice to the defendant that he should treat the plea as a nullity, and, accordingly, on the 20th of April, he signed judgment as for want of a plea.

On a former day in this term, *Welsby* obtained a rule to shew cause why that judgment should not be set aside for irregularity, with costs, on the ground that the defendant had the same time for pleading, in all cases, after the grant of oyer, as he had at the time when it was demanded (*a*), and therefore the plea was delivered in time.

Crompton now shewed cause, and contended that a plea in abatement must in all cases be delivered within four days from the delivery of the declaration. He referred to a case of *Barrow v. Bell* (*b*), in this court, where, the declaration having been delivered on the 30th of May, the defendant, on the 3rd of June, (the last day for pleading in abatement), received a demand of oyer, which was granted on the 4th, but too late to enable the defendant to plead on that day, and a plea in abatement delivered before eleven o'clock on the morning of the 5th was held too late. [*Purke*, B.—I think that case must have been decided without adverting to the rule of H. T., 2 Will. 4, since which, as was decided in *Ryland v. Wormald* (*c*), the four days within which a plea in abatement must be delivered are no longer to be reckoned inclusively of both the first and last day. Here the plea was certainly in time.]

Welsby, in support of the rule, was not called upon.

PER CURIAM (*d*),

Rule absolute.

(*a*) See 1 Saund. 291, n. (*k*); 1 Chit. Pl. 23; 1 Chit. Archb. Pr. 210, and the cases there cited.

(*b*) Not reported.

(*c*) 2 M. & W. 393.

(*d*) *Pollock*, C. B., *Parke*, B., *Rolfe*, B., and *Platt*, B.

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April 19.

DONE v. WALLEY.

One of the co-sureties of a bond received from his principal a promissory note to the amount of that instrument:—*Held*, that it was a question for the jury to say *quo animo* the note was given, and whether it was given in pursuance of an arrangement that the defendant should be thereby discharged, or merely by way of collateral security, in which latter case the defendant would be liable for contribution on payment of the bond by his co-surety.

ASSUMPSIT for money paid, and on an account stated. Pleas, first, as to 22*l.* 15*s.*, parcel &c., payment of that sum into court; and secondly, as to the residue, non assumpsit.

At the trial of the cause, before *Erle, J.*, at the last assizes for the county of Chester, it appeared that the action was brought to recover contribution for a sum of money paid upon a bond conditioned for the payment of £250, which had been executed by one Dodd as principal, and by the plaintiff and defendant as his co-sureties. Previous to the execution of the bond, Dodd had borrowed a sum of money from a third party, for which he had given a promissory note for £200 by way of security, as principal, with the plaintiff as his surety. Upon the arrival of this note at maturity, the payee applied for payment; and in order to meet the demand, the loan of £250 was requested, and that sum was agreed to be lent to Dodd by the obligee of the bond, on condition that the plaintiff and defendant would enter into another bond as sureties for Dodd. Before the plaintiff would execute the bond, she insisted upon the promissory note being delivered up, and that a fresh note for £250 should be given to her by Dodd. This was done, and she thereupon executed the bond; but there was no evidence that the defendant was aware of this part of the transaction. It was contended, on the part of the defendant, that the present action would not lie. The learned Judge left it to the jury to say whether the plaintiff and defendant were co-sureties for Dodd; and he told them, that if they should be of that opinion, the plaintiff would be entitled to recover. The plaintiff obtained a verdict.

Evans now moved for a new trial, on the ground of misdirection.—In the present case the plaintiff was herself the

principal in the transaction, as she received a promissory note from Dodd; and as that fact was unknown to the defendant, it would be unjust that she should have this remedy, in addition to that which the note enables her to adopt. These parties do not stand in the relation of co-sureties, and the learned Judge should not have so directed the jury. This action is purely an equitable one. (He referred to *Cowell v. Edwards* (a)). In the notes to *Lamp-igh v. Brathwait*, in Smith's Leading Cases (b), it is said—"On the same ground as the liability of a principal to reimburse his surety, depends the right of one surety or joint contractor, who has been obliged to satisfy the whole demand, to recover a proportionable contribution from his fellow surety or contractor. He is a person who has been compelled to satisfy a demand, parcel of which his fellow was compellable to satisfy; though, indeed, if one have become surety at the instance of the other, particularly if that other have received from the principal a separate indemnity for himself, it will be different: *Turner v. Davies* (c)." Such was the case here, and that was the ground of the objection raised for the defendant at the trial. [*Rolfe*, B.—It was surely a question of fact for the jury to say upon what terms the defendant signed the bond. *Primâ facie* the defendant is liable to the plaintiff for contribution, as they are co-sureties for the loan made to Dodd.] It would be unjust that the plaintiff should have her remedy on the promissory note against Dodd, and also in this action against the defendant.

POLLOCK, C. B.—There ought to be no rule. It appears to me that the direction of the learned Judge at the trial was quite correct. The circumstances of this case are shortly these:—A promissory note for £200 had been given by Dodd, and a sum was offered to be advanced to him

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(a) 2 Bos. & P. 268. (b) Vol. 1, p. 71. (c) 2 Esp. 478.

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upon the plaintiff and defendant entering into a bond as co-sureties. The plaintiff, before executing that instrument, insisted upon having a note for £250 given to her. The simple question is, whether the note for £250 was given by Dodd to the plaintiff as a mere collateral security for the payment of the money on the bond, or whether there was such an arrangement as to extinguish the defendant's liability as co-surety. That was a question of fact for the jury, and was, I think, properly left to them.

PARKE, B.—I am of the same opinion. The only question is, *quo animo* the promissory note was given. If it could be supposed that there was an arrangement between the several parties, by which it was agreed that the note should be given to extinguish the defendant's liability as co-surety, so that the plaintiff was only to look to Dodd and not to the defendant at all, the learned counsel for the defendant should have had that question left to the jury. But it seems to me that the real motive in taking the note was that Dodd should repay the plaintiff, or, in other words, it was taken as a collateral security for repayment, if she should be called upon to pay the amount of the bond; and I do not think that the question with respect to the defendant is in the least degree affected by that transaction.

ROLFE, B., and PLATT, B., concurred.

Rule refused.

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WILLIAMS v. PIGOTT, Bart.

ASSUMPSIT for work, labour, and materials, money lent, money paid, and on an account stated. Pleas, non assumpsit and payment. The plaintiff joined issue upon the first plea, and traversed the latter, and upon that replication issue was joined. At the trial of the cause, before *Patteson, J.*, at the last Summer Assizes for the county of Gloucester, it appeared that the plaintiff was the solicitor of "The Wolverhampton, Bridgnorth, and Ludlow Railway Company," and that the present action was brought to recover the amount of his bill. The defendant was a member of the provisional committee. On the 6th of November, 1845, the plaintiff and defendant attended a meeting, when the former was appointed solicitor to the company. The prospectus of the company was then drawn up, in which the names of both parties respectively appeared. The prospectus contained the following clause: "Until an act of Parliament shall be obtained, the affairs of the company shall be under the direction and control of the committee of management, who are hereby empowered to enter into such arrangements as shall best serve the interests of this company and the public, with existing or projected companies, and also to nominate the first directors of the company." At that meeting the managing committee were appointed by the provisional committee: but the defendant was not, in the first instance, one of the managing committee; but after he had left the meeting, his name was substituted for that of another person as one of that committee. Evidence was adduced for the purpose of shewing that he knew of and recognised his appointment; that several circulars, issued to the members of the managing committee, had been sent to him, which had not been returned; that his name had been advertised in the local papers, which he was in the habit of

In an action against a provisional committee-man of a railway company, it is a question of fact for the jury, whether he has appointed the committee of management with power to pledge his credit upon a contract entered into by them.

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taking in; and that on one occasion he agreed to attend a meeting of the managing committee, which engagement, however, he did not fulfil. There was no evidence of his ever having repudiated his appointment as a member of the managing committee. In January 1846, in answer to an application made to the defendant, as one of the provisional committee, to take up the shares allotted to him, in order to raise a fund to defray the expenses of the company, he wrote, that, "after the best consideration which he had been able to give the subject, he thought it desirable to decline the shares which it was proposed to allot him, as one of the members of the provisional committee." The scheme failed from want of sufficient funds to carry it on, but the project was altogether a bonâ fide one. The learned Judge told the jury, that the mere circumstance of the defendant being a member of the provisional committee did not make him liable; that it was equally clear, that his merely assisting at the appointment of the managing committee did not render him liable for their acts; and that the question for their consideration was, did the provisional committee appoint the managing committee their agents, with power to pledge their credit, and had the defendant accepted the office of managing committee-man? The jury found a verdict for the defendant.

Whateley now moved for a new trial, on the ground of misdirection.—The defendant was one of those who appointed the managing committee to act as their agents, for the purpose of managing the affairs of the company, and to pledge their credit for all necessary expenses. In a case of *Wood v. Harding* (a), *Wilde*, C. J., is said to have directed the jury, "that a shareholder who was present at a meeting at which the committee of management was appointed, was personally liable for all the orders subsequently given by

(a) Not reported.

such committee." [Parke, B.—That would depend upon the question raised in *Wyld v. Hopkins* and *Reynell v. Lewis* (a) as to what is the effect of the appointment of the acting committee. "Is the meaning that the acting committee is to take the whole management, to the exclusion of the provisional committee, their provisional character having ceased, in which case the provisional committee would not be liable? or does it mean that the provisional committee-men have appointed the acting committee, or the majority of it, on their behalf and as their agents, in which case they would be liable for the contracts of the acting committee, or the majority, made as such agents?" That is a question of fact for the jury.] The prospectus of the company directs the committee of management to carry on the affairs of the company. [Parke, B.—In the case of *Wood v. Harding*, no doubt, it was left to the jury to say whether, under all the circumstances of that case, the defendant had given the committee authority to act for him and to pledge his credit. The prospectus in the present case does not prove anything. It is consistent with that document, that the managing committee had the whole management of the affairs of the company in their own hands, on their own responsibility, and that the provisional committee had nothing to do with it beyond the mere fact of lending their names. It does not follow that the committee of management were to pledge the defendant's credit, because they were to manage the concern.] In *Pitchford v. Davis* (b), Parke, B., says, "The secretary who gave the order to the tradesman is the party primarily liable; the directors, also, who gave the orders to the secretary, may be liable. A third person may become liable, if it can be shewn that he has authorised the act of the directors in making the contract."—He also referred to *Barnett v. Lambert* (c).

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(a) 15 M. & W. 517.

(b) 5 M. & W. 2.

(c) 15 M. & W. 489.

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POLLOCK, C. B.—I am of opinion that there ought to be no rule. It is impossible to lay it down as a matter of law that if the provisional committee appoint the managing committee, they give the managing committee authority to pledge their credit. It is a question for the jury, and the question here was properly left to them.

PARKE, B.—I am of the same opinion. The whole matter is a question for the jury. My Brother *Patteson* left it correctly to the jury to say whether the defendant did accept the appointment of managing committee-man. If he did not, and that question was found in favour of the defendant, he would not be liable unless there was something more. The case was, in the next place, put upon the ground that, as a member of the provisional committee, he appointed the managing committee to act as his agents. That point, which is for the jury, was correctly put to them. I cannot help observing, that unless something more appears than that there is a managing committee appointed by a provisional committee, the provisional committee never dream that, by such appointment, they render themselves liable for all the acts of the managing committee. The questions were properly left to the jury, and therefore there ought to be no rule.

ROLFE, B., and PLATT, B., concurred.

Rule refused.

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SMITH and Another v. TATEHAM and Another.

May 5.

DEBT by the plaintiffs against the defendants, as executors of one W. Greatwood, for work and labour done by the plaintiffs, as attornies and solicitors, for the deceased, and on an account stated.

Plea, *plenè administravit præter* £10, and that that amount was not sufficient to satisfy a specialty debt of one G. S. Verification.

Replication, "that this action was commenced on the 5th of July, 1847, and that, after the commencement thereof, and after the pleading of the said plea by the defendants, and before this day, divers goods, chattels, and monies, which were of the said W. G. at the time of his death, of great value, to wit, to the amount of the causes of action in the declaration mentioned, and over and above the value and amount of the said cause of action so confessed in the said plea to be due to the said G. S., and over and above the value and amount of the said debt of &c. in the said plea mentioned, came to and were in the hands of the defendants, as executors as aforesaid, to be administered, and wherewith the defendants could and ought to have satisfied the causes of action in the declaration mentioned. Verification.—General demurrer, and joinder.

The defendants' points (amongst others) were, that the fact of assets having come to the hands of the executors after the plea and before the replication, cannot form the subject-matter of a good replication in law to the defendants' plea of *plenè administravit præter*, and that the matters set out in the replication are not in accordance with the plea, and afford no answer to it.

The plaintiffs' points were, that the replication shews facts which avoid the plea; and that the plaintiffs cannot pray judgment of assets *quando*, inasmuch as the plaintiffs, *held bad*, on general demurrer, as unnecessary and unprecedented; and that the proper course was to take the ordinary judgment of assets *quando acciderint*.

The judgment of assets *quando acciderint* embraces not only the assets received by the executor after that judgment is signed, but also such assets as came into or ought to be in his hands between the issuing of the writ, or the plea, and the judgment, in the due course of administration.

To an action of *assumpsit* against the defendant as executor, the defendant pleaded *plenè administravit præter* £10, which was not sufficient to satisfy a specialty debt. The plaintiff replied, that after the commencement of the suit, and after plea pleaded, certain goods of the deceased had come into the executors' hands, in value above the sum of £10, wherewith the defendants ought to have satisfied the causes of action mentioned in the declaration:—

Held bad, on general demur-

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in order to recover such assets, must shew that they came to the defendants' hands after the judgment, whereas the assets were here received by the defendants after plea and before replication; therefore a judgment of assets quando would not avail the plaintiffs, as far as those assets are concerned.

Needham, in support of the demurrer.—This replication is bad, as it is unprecedented and unnecessary. The plaintiffs should have taken the ordinary judgment of assets quando acciderint, which would have entitled them to all the assets which are the subject of the present replication, for that judgment covers all assets which may come into the executors' hands after plea pleaded. The usual and proper form of judgment is given in Chitty's Forms, p. 496, Form 7. The replication is also bad, as it does not confess and avoid the plea, which itself is a good and sufficient answer to the declaration.

The whole difficulty seems to have arisen from a misapprehension as to the period of time over which the judgment of assets quando extends. The present form of replication has been adopted from one in Wentworth's Precedents (*a*); but Mr. *Barrow*, who prepared it, expressed an unfavourable opinion as to its validity. The form was perhaps suggested by what passed in the case of *Mara v. Quin* (*b*), upon which there is a note in Wms. Saunders (*c*); but the suggestion of Mr. Justice *Ashhurst* only applies to the case where the assets accrue after writ and before plea. [*Rolfe*, B.—Could a defendant plead, by way of rejoinder, plenè administravit to this replication? If he could, the pleadings might be indefinitely prolonged. *Parke*, B.—If the defendants had not rejoined, what would be the judgment? Would it be in the nature of a judgment of nil dicit, all the pleadings with the exception of the declaration being struck out? In such case the defendants would have

(*a*) Vol. 3, p. 224. (*b*) 6 T. R. 10. (*c*) 1 Saund. 336 (*a*).

to pay costs de bonis propriis. Now, in the ordinary case of judgment of assets quando acciderint, the costs are payable de bonis testatoris, and the defendants ought not to pay costs here.] Many difficulties are suggested by this unnecessary and unprecedented form of pleading, with which the defendants do not know how to deal. [He was then stopped by the Court.]

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Montague Smith, in support of the replication.—The judgment for which the defendants contend is new, as there is no authority to shew that a judgment of assets quando would reach all those assets which have come into the executors' hands at a time subsequent to the plea, but anterior to the judgment. It is said, in a note in *Wms. Saunders*, 229, n. (2), that "it seems necessary to state that the assets came to the executor's hands *after* the judgment; for the scire facias must pursue the terms of the judgment, which, in this case, are, that the plaintiff do recover his debt to be levied of the goods of the testator which shall *thereafter* come to the hands of the executor." The form of judgment suggested there presumes a form of pleading similar to the present; and this replication admits the plea to be good, but states that since the period when the plea was pleaded additional assets have come into the defendant's hands; so that the Court is entitled upon this replication to give a judgment in accordance with the facts, which, according to the case of *Mara v. Quin*, could not otherwise be done. [He also referred to *Taylor v. Holman*(a), and *Wms. Executors*, 1554, n. (1).] The costs in such case would be payable out of the assets, for the replication admits the sufficiency of the plea, and therefore the defendant is defended with reference to those matters which affect him personally, but he is undefended as to the debt and cause of action. It has been urged that the pleadings might be indefinitely extended,

(a) Bull. N. P. 169.

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but such might be the case in pleas puis darrein continuance. This form is consistent with principle, and should therefore be allowed.

Needham, in reply.—A judgment of assets quando is in common use, and cannot be said to have the inconvenience of novelty. The only question is, whether it is applicable to the facts of the present case. This replication is relied upon as affording the Court an opportunity of giving the same judgment in effect as the ordinary one of assets quando. This form of pleading is therefore, at least, unnecessary.

POLLOCK, C. B.—We are all of opinion that there must be judgment for the defendants. In this case there is a plea of plenè administravit præter, and to that plea there is a replication, that since plea pleaded certain assets, sufficient to have satisfied the plaintiffs' debt, have come into the executors' hands; and we are all of opinion that this replication is bad. The whole question turns upon what is the true effect of a judgment of assets quando acciderint. It appears to us, that that judgment not only reaches such assets as shall be received after the judgment is signed, but all those as shall after that time *actually exist* in the hands of the executor. By giving this effect to the judgment, we reconcile all the conflicting cases, and get rid of the difficulty. It was not correctly said by Mr. *Smith*, that the assets only which are received by the executor after the judgment are affected by it, and that such as come into his hands after the time of plea pleaded and before judgment, are not. In point of fact they will be, unless in the meantime they be properly disposed of by the executor. I think, therefore, that this replication is bad.

PARKE, B.—I am of the same opinion. I think that this is a bad replication; it is without precedent, with the ex-

ception of that in *Wentworth*; and Mr. Barrow there says, that he fears it is unprecedented, and therefore, perhaps, not to be preferred. It seems to me to be bad, because it does not shew that the plaintiffs had any right to sue the defendants when the writ was issued; and if we were to allow this replication, it might be productive of great inconvenience. There might be no limit to the pleadings in these actions, if a defendant were to rejoin to the effect of *plenè administravit* or *plenè administravit præter*, and to that rejoinder the plaintiff were to surrejoin, that, since the last pleading, additional assets had come into the executor's hands, and so on *ad infinitum*, in which case the pleadings might be indefinitely prolonged. In the next place, there is a difficulty with regard to costs, in case the defendants did not rejoin, for in the ordinary course the want of a rejoinder constitutes a judgment by default; and in the case of judgment by default, in actions against executors, the defendants are liable to costs *de bonis propriis*. Now, executors ought not to be liable for costs personally, where they have a good answer to the action at the time it is brought; it would be unjust, therefore, to allow an ordinary judgment by default in such a case, and we should introduce a new practice by allowing such a judgment with costs payable *de bonis testatoris*. So, if the defendant were to traverse the averment of assets having come to his hands since the plea, and the issue were found against him, he would be liable to the costs of the suit *de bonis propriis*; which he ought not to be, as he had a good defence when the action was brought. I think, therefore, that the replication is clearly bad. And there appears to me to be no necessity for it. The proper course is to take judgment of assets *quando*, which seems sufficient to embrace not only those assets which were actually received by the hands of the executor after the time when judgment is signed, but also those which came between the issuing of the writ, or the plea, and the judgment, and which *are* or ought to be

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in his hands, in the due course of administration, after the judgment. The question before us was first discussed in *Mara v. Quin*, where Lord *Kenyon* said, "that the ordinary method of entering up a judgment of assets quando acciderint was not correct; for as, on the issue of plenè administravit, no evidence could be given of assets after the writ sued out, if the judgment were only to affect assets received after the judgment, there was an interval between the commencement of the action and the judgment, in which, if the executor received any assets, they could not be taken at all." And Mr. Justice *Ashhurst* observed, that as the plea of plenè administravit was, that the executor "hath not, nor had at the time of suing out the writ, nor at any time since, any assets," &c., he saw no objection to the plaintiff's replying to the latter part of the plea, that the executor had assets since, &c.; and upon that suggestion of Mr. Justice *Ashhurst*, the form of replication was adopted, which has since been occasionally used (a). I must own that I see great objections to the form of replication as suggested by Mr. Justice *Ashhurst*; that form, as it does not shew any right of action in the plaintiff against the executor, when the writ was sued out, is open to some of the same objections as the present; neither do I think that the difficulties suggested by Lord *Kenyon*, with respect to the form of the judgment of assets quando, are of weight. That judgment, as it seems to me, may be construed to affect all assets which may be or ought to be, according to the due course of administration, in the hands of the executor after the judgment, provided they are received (or *might have been by due care*) since the commencement of the suit, the question as to the state of the assets at the commencement of the suit being concluded by the admission of the truth of the plea, by taking judgment of assets quando acciderint; but the executor would not be liable, if assets were received

(a) See the form, 3 Chit. Pl. 44.

before judgment, and they had been properly applied. If they had been misapplied, I take it that he would be responsible, and that it would be no answer to a scire facias, issued upon the judgment of assets quando, to say that they had not been actually received at any time after the judgment, if after the judgment he *ought to have had them in his hands*, or ought to have received them. I think, therefore, that there is no good reason for the adoption of this new-fangled form of replication, which is certainly bad.

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ROLFE, B.—I am of the same opinion. It is satisfactory to find that the principles of the common law are sufficient to meet the exigencies of almost every case, and that they are not deficient in the present case. I concur in what has been said by my brother *Parke*, with reference to the observations of Lord *Kenyon* and Mr. Justice *Ashhurst*, in *Mara v. Quin*. The case of *Taylor v. Holman* was relied upon by the learned counsel for the plaintiff, for the purpose of shewing that, in an action of debt or of scire facias, upon the judgment of assets quando, those assets alone are affected by it which have come into the executor's hands at a time posterior to the judgment. In the case of *Noel v. Nelson* (a), the learned annotator has made the following observations, to which Mr. *Smith* refers:—"It seems necessary to state that the assets came to the executor's hands *after* the judgment; for the scire facias must pursue the terms of the judgment, which, in this case, are that the plaintiff do recover his debt to be levied of the goods of the testator which shall thereafter come to the hands of the executor. Therefore, where a scire facias on such a judgment as this, of assets quando acciderint, stated that divers goods, &c. of the testator, sufficient to pay &c., had come and were in the hands of the defendant to be administered, &c., without stating that those goods had come to the defendant's hands *since the judgment*, and

(a) 2 Saund. 229.

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prayed execution against the defendant, to be levied upon these goods according to the form and effect of the said recovery, &c., the defendant pleaded that, *after the plaintiff's judgment*, no goods, &c. of the testator had come to the defendant's hands to be administered, &c., to which the plaintiff replied, that divers goods, &c. had come to the defendant's hands, without adding, 'and *since* the judgment;' and, on demurrer, it was adjudged that the scire facias was wrong, for want of the words '*after the judgment*.'" Now the whole difficulty of the present case arises, as it appears to me, from the fact of the meaning of the latter words of the judgment of *assets quando acciderint* not having been properly understood. The note in Saunders proceeds thus:—"For where an executor pleads *plenè administravit*, the plaintiff may either deny or admit that allegation. If he admits it, he takes judgment, and prays that his debt may be levied of such assets as may *afterwards* come to the hands of the executor to be administered; the praying of the judgment is an admission that there are no assets in the executor's hands at that time." I think that that is not altogether correct. It is immaterial whether the assets have come into the executor's hands at a period antecedent to or posterior to the judgment, provided they have come since the commencement of the suit. All assets in the executor's hands at that time, unadministered, are liable, and are

tiffs amend, they should take the ordinary judgment of assets quando.

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Leave to amend, by taking judgment of assets quando, and on payment of costs. Otherwise

Judgment for the defendants.

NICHOLSON v. BROOKE and Others.

May 10.

DEBT for wages and salary due to the plaintiff, as the secretary and servant of the defendants. Plea, by all the defendants, except as to £23, never indebted; and as to that sum, payment thereof into court. The defendants all appeared by the same attorney.

Where several defendants appear by several counsel, it is a matter for the discretion of the presiding judge whether he will allow more than one counsel to be heard. *Semble*, that, where one defence alone is relied on, the better rule is, that one counsel only ought to be heard.

At the trial, before *Parke*, B., at the London Sittings in the present term, it appeared that the plaintiff acted as the secretary to the company of which the defendants were all members, and the only question was, whether all the defendants were parties to the contract. After the counsel for one of the defendants had addressed the jury, *Lush* applied to be also heard for the other defendant Brooke, but was refused by the learned judge. The plaintiff obtained a verdict.

Lush now moved for a new trial.—The learned judge ought to have allowed counsel to address the jury for the defendant Brooke. If there had been separate pleas put upon the record, he would have been entitled to that right; and the fact that there is only one plea which is adopted in practice, can make no difference in that respect. [He referred to *King v. Williamson* (a), *Massey v. Goyder* (b), *Ridgway v. Philip* (c).] [*Parke*, B.—There was only one

(a) 3 Stark. 162. (b) 4 C. & P. 162. (c) 1 C., M. & R. 415.

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defence substantially set up in the present case, for if the plaintiff had failed to shew that one defendant was a party to the contract, he would have failed as to all; and for that reason I refused the application. *Pollock*, C. B.—In *Chippendale v. Masson* (a), Lord Chief Justice *Gibbs* said—“The interest of the defendants being the same, I can only hear one counsel. This is a rule I received from a judge of whom no one can speak without respect, and almost reverence; I mean my very learned and excellent predecessor, Chief Justice *Mansfield*. By this rule I will abide.” *Rolfe*, B.—The cases shew that it is a mere matter for the discretion of the judge at the trial.]

POLLOCK, C. B.—There will be no rule. It is a matter purely for the discretion of the judge at *Nisi Prius*, whether he will allow one or more counsel to address the jury on the part of the defendants. If there are a number of defendants whose interests are precisely the same, and only one point of defence is raised, he exercises a proper discretion by allowing only one counsel to address the jury.

PARKE, B., *ROLFE*, B., and *PLATT* B., concurred.

Rule refused.

(a) 4 Camp. 174.

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OSWALD v. THOMPSON.

May 12.

INTERPLEADER issue, to try the right to certain goods seized by the Sheriff of Middlesex, under a writ of execution upon a judgment recovered by the defendant, in an action of *Thompson v. Pace*.

At the trial, before *Alderson, B.*, at the sittings for Middlesex in the present term, it appeared that on the 15th of January, 1846, *Pace* executed a deed of assignment to the plaintiff of all his furniture, including the goods in question, and that afterwards, on the 21st of April, a fiat in bankruptcy issued against *Pace*, the deed of assignment constituting the act of bankruptcy to support that fiat. The debt of *Pace* to the defendant was not contracted until the succeeding year. The learned judge was of opinion that the deed was not void as against the defendant, who was not a creditor at the time of its execution, although its execution might amount to an act of bankruptcy, under the 3rd section of the stat. 6 Geo. 4, c. 16; and, subject to that direction, he left it to the jury to say whether the goods which were the subject of the assignment were the property of the plaintiff. The jury found that they were, and the plaintiff had a verdict.

A deed for the transfer of a trader's property is not void as against future creditors, although the execution of it be an act of bankruptcy under the 3rd section of the stat. 6 Geo. 4, c. 16.

James now moved for a new trial, on the ground of misdirection.—The execution of the deed was an act of bankruptcy, and no property in these goods passed to the plaintiff. This deed was void. The question does not depend upon the stat. 13 Eliz. c. 5. The words of the 3rd section of the 6 Geo. 4, c. 16, are—"That if any such trader shall make or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, or make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels, every such trader doing, suffering, pro-

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curing, executing, permitting, making, or causing to be made, any of the acts, deeds, or matters aforesaid, with intent to defeat or delay his creditors, shall be deemed to have thereby committed an act of bankruptcy." Now, the execution of this deed being an act of bankruptcy, the deed itself cannot be made available against any party, whether he be a creditor at the time of its execution, or after that period. [*Platt, B.*—It is not void as against Thompson, who was a creditor long after the deed was executed. *Rolfe, B.*—There is nothing in the act which makes the deed void as against future creditors. The 3rd section merely makes the execution of the deed under the circumstances there stated an act of bankruptcy.]

PER CURIAM (*a*).—There will be no rule. The execution of the deed by which the goods were assigned to the plaintiff was long before the defendant had become a creditor of Pace; as against him, therefore, it is not void, and the jury were rightly directed.

Rule refused.

(*a*) *Pollock, C. B., Parke, B., Rolfe, B., Platt, B.*

May 10.

REGINA v. RENTON.

A party in custody under a writ of extent, at the suit of the Crown, was allowed voluntarily to escape, but was re-taken and restored into the same custody, and under the same writ:—

Held, that he was rightly in custody, and was not entitled to his discharge.

Writs of extent are returnable in *vacation*, under the stat. 5 & 6 Vict. c. 86, s. 8.

LUSH had obtained a rule, calling upon the Attorney-General, or the Commissioners of Excise, and the Sheriff of the county of Surrey, to shew cause why the writ of extent issued against the defendant should not be quashed, and the defendant discharged out of the custody of the sheriff. It appeared from the affidavits, that the defendant was taken in custody upon the 31st of January, under a writ of extent

issued at the suit of the Crown, for certain penalties incurred by him for having violated the Excise Laws. The writ was made returnable in vacation. The defendant had been removed from prison on the 12th of February, by an order of the Commissioners of Excise, for the purpose of giving evidence upon matters with respect to the writ of extent. He was afterwards taken back to the same custody. The above rule was obtained upon two grounds: the first was, that the writ was void, as the return-day was in vacation; and secondly, that the fact of the defendant having been removed from gaol without a habeas corpus ad testificandum operated as an escape, and that he was entitled to his discharge.

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The *Attorney-General* now shewed cause.—The first point upon which this rule was obtained is settled by the 8th section of stat. 5 & 6 Vict. c. 86, which authorises the return of writs of extent to be made in vacation. As to the main point in the case (which is an important one), it may be admitted that, as between subject and subject, if a party is brought up out of gaol without a habeas corpus, it is a voluntary escape, and he cannot be retaken. But this rule only applies as between subject and subject, and not as between a subject and the Crown. [*Pollock*, C. B.—The Crown is not affected by the laches of its officers.] It was so said in *Sheffield v. Ratcliffe* (a). The same rule is laid down in *The Attorney-General v. Chitty* (b), which was approved of in the more recent case of *The Attorney-General v. Walmsley* (c). The case of *The Attorney-General v. Ansted* (d) is founded upon the same principle, which, in truth, disposes of the present question. But an anonymous case in *Savile* (e), which is translated in *West on Extents* (f), is precisely in point. There, “It was said

(a) Hob. 347.

(b) Parker, 48.

(c) 12 M. & W. 179.

(d) 12 M. & W. 520.

(e) Page 29.

(f) Page 87.

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by Fanshawe, the Queen's remembrancer, that if one be in execution at the suit of the Queen, in the Fleet, the warden of the Fleet may suffer him to go to his counsel with his keeper; but it is otherwise if he be in execution at the suit of a common person. And the reason is this, that if he that is in execution for the Queen happen to escape, the warden for the Queen may retake him; but it is otherwise in the case of a common person: *quod tota curia concessit*." There was, therefore, no doubt at all expressed upon that part of the case. "And in Michaelmas Term, (24 Eliz.), Edward Fisher was in execution at the suit of Serjeant Puckering, and afterwards procured himself to be in execution at the suit of the Queen, and came into court by Serjeant Fenner, and prayed that he might have leave to go to his counsel, when good sureties found to the Court. *Shute*.—The party has interest in his body as well as the Queen. *Manwood*.—But if the Queen had first execution, then it was doubted when he was in the Common Pleas, in the case of Draycot. *Shute* and *Chick*.—It is all one in our opinion; and of the same opinion was *Gawdy*, Justice." It is also stated in the same work (a), that "the distinction taken in Godbold, p. 298, is, that where the party is first taken for the Crown, there the subject cannot have an interest in his person simul et semel with the King; but where the party is first taken by the subject, there the subject may have an interest in his debtor's person simul et semel with the Crown. But it may be that there are many cases which this distinction will not reconcile." There the Queen's remembrancer was an officer certifying the practice of the Court, that a party in custody at the suit of the Crown might go out with the keeper, as in the present case. In Dyer (b) it is said, "And by the leave of the Court he shall be suffered with a keeper to go to his counsel, with instructions to prosecute the attaint."

(a) Page 88.

(b) Vol. 3, p. 365 a.

Watson and *J. Wilde*, who also appeared to shew cause on the part of the Crown, were stopped by the Court.

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Lush and *J. W. Rogers*, in support of the rule.—The first point upon which this rule was obtained is admitted not to be sustainable. As to the second point, it is submitted that the case stands upon a different footing from that upon which it has been put by the *Attorney-General*. This is not the case of a voluntary escape, in the sense in which that term is ordinarily used. The Crown cannot take its debtor out of prison without a writ of habeas corpus, or the leave of a Court of law. Here the debtor was dealt with under the authority of the Crown. [*Pollock*, C. B.—If the Crown has the right so to deal with its debtor, then *cadit quæstio*; if the act be wrong, then the Crown is not bound by the act of its officer.] This is the act of the Crown itself. A person who is wrongfully taken out of custody cannot be taken again into custody under the same authority by which he had been previously detained. There is a case in *Dyer*(*a*), where it is said, that “the command of the treasurer and chancellor are not sufficient warrant to license one condemned in execution to go with a keeper, or otherwise, at large, for the Queen herself could not do that, as was holden by the opinion of all the justices of both benches in the time of Queen Mary.” [*Parke*, B.—There the debtor was in custody at the suit of a subject as well as of the Crown, but that is not the case here.] The law has always regarded with great jealousy the rights of the Crown as affecting the liberty of the subject. In *Thurland’s case*(*b*), it was held that the Crown cannot authorise a person, in execution at the suit of a subject, to be taken up for any purpose of its own. The case in *Savile* may be distinguished from the present, as there it was a matter *ex gratiâ* to the subject

(*a*) Vol. 3, p. 297 a.

(*b*) 2 Dyer, 162 b.

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himself, but here it is adverse to him. The general rule is, that where there has been a voluntary escape, the party cannot be retaken under the same writ.

POLLOCK, C. B.—I am of opinion that this rule ought to be discharged. There are several points that might have arisen in this case, and which might have called for a more deliberate and serious judgment; for in some respects the cases may be questioned, and the authorities are to a certain extent conflicting. If the defendant had been in custody at the suit of the subject as well as of the Crown, there might exist a doubt whether the priority of the one or the other would create a difference as to the liability of the sheriff or the liability of the creditor. The question, however, before us is simply this: a defendant in execution, and in custody under a writ of extent, is removed by an order of the Commissioners of Excise (the order being directed to a particular sheriff) for the purpose of giving evidence touching the matter of the extent itself. He is accordingly taken, and returns into the same custody; and the question is, whether he is now entitled, as against the Crown, to his discharge. I am of opinion that he is not. I do not mean to throw any doubt upon the Crown's right to remove the defendant; but that is a question which is very different from the present. Here the question involves this principle only, viz. that the Crown cannot be prejudiced by the misconduct or negligence of any of its officers, whether with respect to the rights of property or the right to the custody of the debtor till the debt is paid. The case in *Savile* is an authority for the principle for which the *Attorney-General* contends, and upon that part of the case there is no doubt whatever. As to the other question there is some doubt, and the authorities are conflicting on that point. I have always understood it to be a maxim of the common law, that the Crown cannot ever be prejudiced by

the laches of any of its officers. That being so, the present case is clear, without reference to the case in Savile, or to any other authority.

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PARKE, B.—I entirely concur with the Lord Chief Baron. I think that the only point we have to decide is, whether, if after an escape (which we may assume to be voluntary) the defendant is again in the custody of the sheriff, he is lawfully in custody under the former extent. I think that is the only point we have to decide. I do not mean to decide that the authority of the Crown would not be a justification for taking the debtor out of the sheriff's custody during that time; but I assume, for the purpose of the argument, that there has been a voluntary escape permitted by the sheriff, and that he has the debtor in custody again under the former writ of extent. Now, there is a clear distinction, according to the authority in Savile, between the case of the subject and that of the Crown. In the former case, there is no doubt that the sheriff could not retake the defendant, because it was his own voluntary escape, and the subject could not take the defendant again, because he is bound by the act of the officer. But in the case of the Crown, as it is not bound by the act of the officer, the escape is nothing. It is an act of wrong on the part of the sheriff who permits the escape, but the execution is not satisfied. I should have come to the same conclusion to which I have arrived in the present case upon principle, and without the authority of the case in Savile, which is directly in point. There the distinction is to be observed between the process of the Crown and the process of the subject; in the former case, the debt is satisfied by the sheriff's voluntarily permitting the defendant's escape, but that is not so in the case of the Crown. As to the disputed points in the case, upon which it is not necessary for us now to give any opinion, the principal one is, whether, in the case of a subject as well as the Crown having the

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debtor in execution, the act of the sheriff in taking the debtor's person out of custody quoad the subject is an escape or not. *Primâ facie*, it would appear that, if a voluntary escape be shewn, it is an injury to the subject, and then he has his remedy. Then if the principle be correct that is stated in one of the cases in *Dyer*, where the executions, as between the Crown and the subject, conflict, it is held that the debtor is really not in execution at the suit of the subject until the execution of the Crown is satisfied. If that is the correct view, and which, according to Lord Chief Justice *Holland*, is so, that disposes of the question. Then, if he is in custody at the suit of both, the Crown and the subject, the act of the officer of the Crown cannot prejudice the subject:—but that is a question upon which we are not at present called to give any decision. For the reasons which I have before given, I think that the defendant is rightly in custody.

ROLFE, B.—I am of the same opinion. The question here lies in a very narrow compass, and it seems to me to be entirely governed by that part of the case in *Savile* which is not controverted by any of the authorities. “It was stated by *Fanshawe*, the Queen’s remembrancer,” (which, I agree, means it was stated *officially*), “that if one be in execution at the suit of the Queen, in the Fleet, the warden of the Fleet may suffer him to go to his counsel with his keeper; but it is otherwise if he be in execution at the suit of a common person; and the reason is this, that if he that is in execution for the Queen happens to escape, the warden for the Queen may retake him; but it is otherwise in the case of a common person.” That evidently applies to the case of a voluntary escape. This case is unqualified by any authority with respect to the case of a voluntary escape with the consent of the keeper. Upon the same writ, the keeper may retake him; but there is introduced into the case this additional fact, that the voluntary escape was by

the consent of the officer of the Crown, which officer cannot give a consent that shall prejudice the rights of the Crown; and the case stands precisely in the same condition as if he had not given any consent; and therefore the party may be retaken, and, being retaken, is in the lawful custody of the Crown. If it were necessary to enter upon the other point in the case, I must own I see very great doubts on that point.

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PLATT, B.—I agree that this rule ought to be discharged. I think, under the present circumstances, the case in Savile is a direct authority.

Rule discharged.

PARRINGTON v. MOORE and Another.

April 26.

TRESPASS for assaulting and imprisoning the plaintiff. Plea, not guilty "by statute." At the trial, before *Alderson, B.*, at the last Summer Assizes for Westmoreland, it appeared that the plaintiff was a labourer in the employment of the North-Western Railway Company, and that the defendant Moore was the owner of some land through which the railway was intended to run; that the plaintiff entered the defendant's land on the 17th of September, 1847, and commenced digging some holes, for the purpose of ascertaining the nature of the soil. The Company were authorised under their act to enter certain land for the purposes for which the plaintiff entered, upon giving the requisite notice, but in the present instance no such notice had been given by them to the owner. The defendant Moore, and the other defendant, his gamekeeper, apprehended the plaintiff as having committed an offence under the Malicious Trespass Act, and took him before a magistrate at Kirkby Lonsdale, where he was charged with the

A party who trespasses upon land, under a fair and reasonable supposition that he has a right to do the act complained of, is not liable to be apprehended, under the 28th section of the Malicious Trespass Act, (7 & 8 Geo. 4, c. 30), by the owner of the property, although the latter have reason to suppose the party to be within the act.

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trespass, and had to pay 5*s.* by way of penalty, and 2*s.* for costs. The plaintiff fairly and reasonably believed himself justified in entering upon and digging in the defendant Moore's land. It was contended on the part of the defendants, that they were justified, under the 28th section of the Malicious Trespass Act, in apprehending the plaintiff, as they had acted *bonâ fide*. The learned judge left it to the jury to say whether the defendants reasonably and *bonâ fide* believed they were justified in apprehending the plaintiff. The jury found that the defendants did so believe. His Lordship directed a verdict to be entered for the plaintiff for 7*s.*, the sum he had paid, reserving leave to the defendants to move to enter a verdict or a nonsuit.

Atherton now moved accordingly.—The question is, whether the defendants are not within the 28th section of the Malicious Trespass Act, (7 & 8 Geo. 4, c. 30) (a). The

(a) The following sections are material. Sect. 24 enacts, "That if any person shall wilfully or maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no remedy or punishment is hereinbefore provided, every such person, being convicted thereof before a justice of the peace, shall forfeit and pay such sum as shall appear to the justice to be a reasonable compensation for the damage, injury, or spoil so committed, not exceeding the sum of £5. . . . Provided, that nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of, nor to any

trespass, not being wilful and malicious, committed in hunting, fishing, or in pursuit of game; but every such trespass shall be punishable in the same manner as before the passing of this act."

Sect. 28 enacts, "for the more effectual apprehension of all offenders against this act, that any person found committing any offence against this act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended, without a warrant, by any peace-officer, or the owner of the property injured, or his servant, or any person authorised by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law."

defendant Moore, at the time he caused the plaintiff to be apprehended, bonâ fide believed him to be within the act, although it turned out afterwards that the plaintiff was not. [Alderson, B.—The plaintiff was clearly acting under the belief that he was not a trespasser, and therefore the defendants had no right to apprehend him.] If a peace-officer apprehends a trespasser without a warrant, bonâ fide believing that the person he so apprehends is within the act of Parliament, he is not to be rendered liable for so doing, because it afterwards appears that such person reasonably supposed that he was not within the act. [Pollock, C. B.—A trespasser who acts under a fair and reasonable supposition that he had a right to do the act complained of, is within the proviso of the 24th section; he is not a person found committing an offence against the act, and liable as such to be apprehended under the 28th section. Rolfe, B.—The defendants admit that the plaintiff was not an offender against the act. But you wish us to put a construction upon the act, as if it had said that a person may, without a warrant, apprehend another whom he supposes an offender. Platt, B.—Would the defendants be entitled to a notice under the 41st section?] It would appear so from the case of *Hughes v. Buckland* (a).

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POLLOCK, C. B.—There ought to be no rule in this case. The defendants' counsel ask us to read the act, as protecting persons who apprehend not only offenders against the act, but those whom they reasonably suppose to be so.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Rule refused.

(a) 15 M. & W. 346.

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May 2.

M'GREGOR v. FISKEN.

The Scotch Sequestration Act (2 & 3 Vict. c. 41) provides for two distinct species of warrants to be granted by the Lord Ordinary, one for the protection of the debtor from arrest, the other for his liberation when in custody. Thus a warrant which recites that the Lord Ordinary had considered the petition of A. B., and sequestrates his estates, and declares them to belong to his creditors, and appoints the creditors to hold two meetings at a certain time and place, to elect interim factors and trustees, and remits to the sheriff, to proceed according to the statute, and "grants a warrant of protection to the said A. B. against arrest or imprisonment for civil debt, until the meeting of the creditors for the election of a trustee," is a warrant of protection only, and therefore a party in custody at the time the warrant is obtained is not entitled under it to his discharge.

IN this case a rule had been obtained, calling upon the plaintiff to shew cause why the sum of 1329*l.* 19*s.* 1*d.*, which had been paid into court in lieu of special bail, should not be repaid out of court, either to the defendant or to a Mr. Alexander Mitchell. It appeared by the affidavits, that the defendant in this action, in and previously to the month of March last, had been carrying on business in partnership with a Mr. James Mitchell, as merchants, under the firm of Ross, Mitchell, & Co., at Glasgow, and at Toronto, in Upper Canada. On the 17th of March the defendant was arrested, under the 1 & 2 Vict. c. 110, s. 3, on the ground that he was going to leave this country. On the 20th the Lord Ordinary made the following order, the Scotch house having become bankrupt, and the defendant and James Mitchell having duly filed their petition:—

"Edinburgh, 20th March, 1848.

"The Lord Ordinary, having considered this petition, with the writs produced, sequestrates the estates now belonging or which shall hereafter belong to the petitioners, John Fiske and James Mitchell, individual partners of the firm of Ross, Mitchell, & Co., merchants, carrying on business in Glasgow, and at Toronto, in Upper Canada, as partners of the said firm and as individuals, before the date of their discharge, in terms of the act, 2 & 3 Vict. c. 41, and declares the same to belong to their respective creditors, for the purposes of the said act appoints the creditors to hold two meetings, at the times and place mentioned in the petition, for the purpose of electing one interim factor or separate interim factors, and one trustee or separate trustees, or trustees in succession, and commis-

only, and therefore a party in custody at the time the warrant is obtained is not entitled under it to his discharge.

sioners, as directed by the statute; remits to the sheriff of the county, where the said meetings are to be held, to proceed in manner mentioned in the said statute; and grants *warrant of protection* to the said John Fiskén and James Mitchell respectively *against arrest or imprisonment* for civil debt, until the meeting of the creditors for the election of a trustee.

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“JOHN A. MURRAY.”

An application was made to *Parke, B.*, at chambers, for the defendant's discharge, on the ground that he was entitled to his liberation under the 2 & 3 Vict. c. 41, (the Scotch Sequestration Act). It appeared that the defendant was about to leave England for Scotland.

Willes now shewed cause.—The defendant is not entitled to be discharged, on the ground that he is not going to leave England, for Scotland is not within the jurisdiction of this Court; neither is he so entitled by virtue of the Lord Ordinary's order, under the Scotch Bankruptcy Act, (2 & 3 Vict. c. 41). This order is not a general order for protection, and, at all events, is not for the *liberation* of the debtor after the arrest. There are two kinds of orders contemplated by the statute: the one, a warrant of protection from arrest, under the 13th section; the other, of liberation, under the 17th section, which enacts, “that the Lord Ordinary may, on application made, either on the petition for sequestration or by a separate petition by the debtor, grant a warrant for liberating the debtor, if in prison, after such intimation to the incarcerating creditor or his known agent as the Lord Ordinary shall deem to be just, and after hearing any such objection to the granting of such warrant; and if the application shall be refused, it shall be competent for the debtor to make a new application for liberation, with consent of the trustee and the commissioners; and, on intimation and hearing objections as afore-

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said, the Lord Ordinary may grant warrant to liberate." Now the warrant which the defendant obtained is only for protection for a given and limited period. The 18th section speaks of the warrant of protection *or* liberation. In the 13th section, which relates to the awarding of the sequestration, and by which the warrant of protection is to be provided for the debtor, there is no warrant of liberation mentioned. The 17th section requires a notice to be given. By the 58th section, the debtor is entitled, by resolution of the creditors, to have his personal protection renewed "for such time as they may think fit; and in such case the trustee shall apply to the sheriff, who shall renew the protection; and the deliverance by him, renewing the same, shall, or an extract thereof, signed by the sheriff-clerk, have the same effect as the original warrant of protection." Here, again, the warrant of *protection*, and not of protection or liberation, is spoken of. Why, therefore, should there be such difference of language, unless two distinct warrants had been contemplated by the act? It was intended by the legislature that the warrant of protection should enable the debtor to be present at a meeting of his creditors; and the Lord Ordinary may grant a warrant, under the 67th section, for the debtor's apprehension, to enforce his examination. The present warrant, therefore, is merely one of liberation, and does not entitle the defendant to his discharge. It may be contended that the departure from England for Scotland is not a *meditatio fugæ* within the meaning of the exception in the 18th section, which says, that "such warrant of protection or liberation shall not be of any effect against the effect of a warrant of arrest or imprisonment in *meditatione fugæ*." It was certainly recently decided by *Wightman*, J., in the Bail Court, that such a departure was not a *meditatio fugæ* (a); but it will, perhaps, not be necessary to discuss that point.

(a) 17 Law J., Q. B., 186.

Aspland, in support of the rule.—The defendant is entitled to his discharge under this warrant. It is sufficient in form under the 18th section, and is to protect the defendant from arrest *or imprisonment*. It must be presumed that the Lord Ordinary has observed all such matters as are necessary to make the order good: *Marsh v. Woolley* (a). As this is an application in favorem libertatis, a liberal construction should be put upon the act. Lastly, there is no *meditatio fugæ*, and that was expressly so decided by *Wightman*, J., in the Bail Court.

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POLLOCK, C. B.—I am of opinion that this rule ought to be discharged. It clearly appears that the defendant intends to go out of the jurisdiction of this Court, and therefore upon that point he is not entitled to his discharge. With respect to the effect of this warrant, I am of opinion that it is merely for protection from arrest, and is totally different from a warrant of liberation. The defendant having been arrested before the warrant was granted, the warrant was inoperative, as he was at that time already in custody.

PARKE, B.—I am of the same opinion. As to the first point, it appears that the defendant intends going to Scotland, which is out of the jurisdiction of this Court; and therefore he has not upon that point answered the plaintiff's affidavit. Then comes the question, whether the defendant is entitled to his discharge under the statute 2 & 3 Vict. c. 41. Two distinct species of warrants are contemplated by that act: the one is for the protection of the debtor from arrest; the other is for his liberation if already arrested. That being so, and as the defendant was in custody before this warrant was granted, he should have made an application to the Lord Ordinary for a warrant of liber-

(a) 1 Dowl. & L. 84.

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ation, which might have been granted after the notice had been given which is required by the act, in order that the creditors may be heard upon the matter. The 18th section does not help the defendant. The words there, "protection or liberation," are to be read, *reddendo singula singulis*, that the warrant of protection shall protect the defendant from arrest, and that the warrant of liberation shall liberate the debtor from imprisonment. For these reasons, I am of opinion that the defendant is not entitled to his discharge.

ROLFE, B., and PLATT, B., concurred.

Rule discharged.

May 12.

JONES v. BONNER and NASH.

Where a pauper plaintiff settles the action behind the back of his attorney, it is entirely a question for the discretion of the Court, under the particular circumstances of the transaction, whether they will interfere and set aside the proceedings.

Where a pauper plaintiff settled the action behind his attorney's back, by executing a release, but it appeared that he

was the first to make the application, and that the arrangement was fair and reasonable, the defendant having pleaded a plea of release *puis darrein continuance*, the Court refused to set aside the deed and the plea at the instance of the attorney.

SKINNER had obtained a rule in the present term, on the part of the plaintiff's attorney, calling upon the defendants to shew cause why the plea of release *puis darrein continuance*, and the deed of release therein mentioned, should not be set aside.

It was an action of trespass brought by the plaintiff, who had been admitted to sue in *forma pauperis*. Issue had been joined, and notice of trial was given for the Herefordshire Spring Assizes in 1848. In March, 1848, a plea of a release *puis darrein continuance* was delivered to the plaintiff's attorney, who thereupon countermanded the notice of trial, and the cause was not tried. It appeared from the affidavits, which were of rather a contradictory character, that the action had been brought for an alleged trespass to the cottage and goods of the plaintiff, committed by the

defendant Nash, who had acted under the commands of Bonner, the plaintiff's landlord. The plaintiff, in his affidavit, stated, that he was sorry he had executed the release, but that he had been induced to do so by reason of a promise made to him by Bonner that he would give him a sovereign, and by one Bodenham, who promised he would put him into a cottage. The plaintiff's attorney, in his affidavit, swore that the plaintiff and Bonner had colluded together to deprive him of his costs, and that the release was executed with this design. This was denied by Bonner's affidavit, and he stated therein that the plaintiff came of his own accord to settle the action; that he gave the plaintiff the sovereign to assist him and his family, who were in very distressed circumstances; that the release in question was signed by the plaintiff at his house, after having been twice read over to him and explained; and that no cottage had ever been offered to the plaintiff by Bodenham, or by any other person, to induce him to execute that instrument. There were other affidavits in confirmation of Bonner's statement.

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Martin now shewed cause.—A plaintiff is not precluded from settling an action, by reason of his suing in formâ pauperis, when he acts bonâ fide. The plaintiff is dominus litis, and upon these affidavits it appears that there was no collusion between him and the defendants. He executed the release, by his own statement, to get rid of the action; and he was to receive an equivalent. The case of *Wright v. Burroughes* (a) will be relied upon by the other side; but there the plaintiff expressed a desire “to deprive the lawyers of costs.” That case cannot be relied upon as laying it down as a rule of law, that a pauper plaintiff cannot settle the action without regard to his attorney. [*Pollock*, C. B.—It must be a matter in the discretion of the

(a) 3 C. B. 344.

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Court, under the circumstances of each particular case. *Rolfe*, B.—Chief Justice *Tindal* there says, “I will not say that cases may not arise in which it may be lawful for a pauper plaintiff to settle with the defendant, without regard to his attorney’s lien.” If there is then a case, I think the present is such a case.] [He was then stopped by the Court.]

Skinner, in support of the rule.—A pauper plaintiff does not stand in the same situation as a plaintiff who has not been admitted so to sue. In all cases where the plaintiff has been held to be dominus litis, he has been solvent. The attorney, in such a case as the present, looks to the result of the action for his recompense. The transaction must, therefore, partake of the nature of a collusion, when the party settles the action behind the back of his attorney, to whom he has entrusted the conduct of the whole matter. [*Platt*, B.—In *Wright v. Burroughes*, *Maule*, J., says, “Here, however, the client cheats his attorney of his costs, and gets nothing himself.”]

POLLOCK, C. B.—I am of opinion that this rule ought to be discharged. In the case in the Court of Common Pleas, which has been relied upon, the Court exercised their discretion upon the facts of that case; but so far from laying it down as a matter of law, that the attorney to a pauper plaintiff is dominus litis, Chief Justice *Tindal* expressly guards himself against such a position. We are not bound by that case, in which the facts were different from those in the present, and I think that the question is one entirely for the discretion of the Court. We cannot assume that an attorney undertakes a cause for a person who has been admitted to sue in formâ pauperis upon the understanding that he may go on in spite of the plaintiff, and that he, and not the plaintiff, is dominus litis. If we are to make that

assumption, Mr. *Skinner's* argument is correct. But I do not think that we can make such an assumption. It is very likely that the Court, in the case of a pauper plaintiff, would look more narrowly into all the circumstances of a transaction of such a nature in order to protect the attorney from the collusion of the parties to deprive him of his costs; but the mere naked fact, that the action has been settled behind the attorney's back, could not be of itself a sufficient ground for the interference of the Court. In the present case it appears to have been a fair, reasonable, and *bonâ fide* arrangement between the parties; and I should be exceedingly sorry that in pauper, as well as in other cases, parties should not be permitted to make peace upon fair and equitable terms, and so to put an end to litigation. I should be exceedingly sorry to put any impediment in the way of such an arrangement.

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ROLFE, B.—I am of the same opinion. In the case of *Wright v. Burroughes*, the late Chief Justice *Tindal*, in the commencement of his judgment, as I have before observed, does not say that in no case can a pauper plaintiff settle the action without regard to his attorney's lien. Now, assuming it to be competent for the parties to settle the action behind the attorney's back, I think that this is just one of those cases in which it should be allowed, for it appears to me that the action would have resulted in nominal damages only. So far from seeing that there is any collusion on the part of the defendants to deprive the attorney of his costs, the plaintiff himself appears to have pressed the arrangement upon the defendant Bonner. I cannot shut my eyes to the language of the plaintiff's affidavit, which I do not think is deserving of much credit, and by which the action seems to me to be evidently that of the attorney. If, then, there is a case in which the Court ought not to interfere, I think the present is that case.

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PLATT, B.—I entirely concur with the rest of the Court. It seems to me that a pauper plaintiff has the same right as any other plaintiff, by a bonâ fide arrangement, to put an end to an action. If it were not so, pauper plaintiffs would become mere instruments in the hands of their attorneys for the purpose of obtaining costs. It seems to me, that when an attorney undertakes to conduct the cause of a pauper plaintiff, as he takes him for better or worse, it becomes his duty to take care to inquire into his character, and to see that he is an honest man. This rule would be a salutary one, and would prevent attorneys from undertaking the case of any rogue and vagabond who might apply to them for their assistance. It would, no doubt, be right that the Court should interfere in a case where the parties put an end to the suit by collusion, for the purpose of cheating the attorney of his costs, but I do not think that such appears clearly from these affidavits to have been the case here. I am therefore of opinion that this rule ought to be discharged.

Rule discharged, with costs.

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May 4.

In the Matter of an Arbitration between THE NORTH STAFFORDSHIRE RAILWAY COMPANY and THOMAS LANDOR, RICHARD HUGHES, and ROBERT HUGHES.

THIS was a rule calling on Thomas Landor, Richard Hughes, and Robert Hughes to shew cause why an award should not be set aside. It appeared from the affidavits, that, on the 30th of December, 1846, the North Staffordshire Railway Company (Pottery line), who were incorporated by the 9 & 10 Vict. c. lxxxv, gave notice, under the 18th section of the Lands Clauses Consolidation Act, (8 Vict. c. 18), to Thomas Landor, Richard Hughes, and Robert Hughes, that they required to purchase certain lands and hereditaments in which the said Thomas Landor, Richard Hughes, and Robert Hughes were interested, and they demanded the particulars of their estate and interest therein. On the 15th of May, 1847, Landor and the others sent to the Company the following notice:—

“To the North Staffordshire Railway Company, &c.—
We the undersigned, Thomas Landor, Richard Hughes, and Robert Hughes, do hereby give you notice, that, as trustees named and appointed in and by the last will and testament of Francis Figgins, of &c., we have and claim an estate and interest in certain copyhold lands and hereditaments situate in Sutton, in the parish of Prestbury, in the county of Chester, required to be purchased or taken by the said Company for the purposes of their said railway; and that we do claim compensation for the said lands and here-

A railway company, in pursuance of the 18th section of the Lands Clauses Consolidation Act, (8 Vict. c. 18), gave notice to L. and H., the parties interested in certain land required for the railway, to treat for the purchase thereof. L. and H. then served the Company with a notice stating that, as trustees under the will of F., they claimed an estate and interest in certain copyhold lands and hereditaments, situate &c., required to be purchased by the Company, and they claimed 3344*l.* 17*s.* 6*d.*, as the amount of compensation for the said lands and hereditaments, and desired to have the same compensation set-

tled by arbitration, and appointed T. one of the arbitrators. Another arbitrator having been appointed by the Company, the two arbitrators nominated an umpire, who proceeded with the reference, when W. claimed compensation, alleging that he had a leasehold interest in the lands in question. The umpire awarded £1861 to be paid by the Company to L. and H., as such trustees, for the purchase of the fee-simple in possession, free from all incumbrances, of and in the copyhold lands and hereditaments required to be purchased by the Company:—*Held*, that, under the statute, the award was bad, the umpire not having found the nature of the interest of L. and H. in the lands, and awarded a distinct compensation in respect of it; but the Court refused to set the award aside, leaving the Company to dispute it when the parties should attempt to enforce it.

Quære, whether it was binding on the parties by reason of their conduct?

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ditaments, and that the sum of 3344*l.* 17*s.* 6*d.* is the amount of compensation we so claim.

“ And we do hereby give you notice and require you to purchase a certain plot of land, part of the said lands and hereditaments situate in Sutton aforesaid, which will be cut off and divided by the works of the said railway, and adjoining or near to the plot of land numbered 422 in the plan and book of reference of the said Company. And we do hereby signify our desire to have the same compensation settled by arbitration. And we do hereby nominate and appoint Thomas Hill, of &c., to be one of the arbitrators in the premises; and we do hereby request you to nominate and appoint another arbitrator; to which said arbitrators, or their umpire, the said claim shall be referred.—Dated &c.

“ THOMAS LANDOR,

“ RICHARD HUGHES,

“ ROBERT HUGHES.”

On the 19th of May, 1847, the Railway Company sent to Landor and the others the following notice:—

“ Whereas the North Staffordshire Railway Company require to purchase and take certain lands and hereditaments for the purpose of the North Staffordshire Railway (Pottery line) Act, 1846, situate in the parish of Prestbury, in the county of Chester, and which are wholly or part of the lands and hereditaments numbered 317, 401, 402, 413, 416, 417, and part of 422, in the plan and book of reference for the railway authorised to be constructed by the said recited act for the said parish of Prestbury: and whereas, on the 14th day of January last, a notice of the intention of the North Staffordshire Railway Company to purchase and take, for the purposes aforesaid, the said lands and hereditaments, was duly served on Thomas Landor, and, on the 15th day of January last, a notice of such intention was duly served on Richard Hughes and Robert Hughes, as the owners of, or as parties interested in, the said lands and

hereditaments, or as parties enabled, by the Lands Clauses Consolidation Act, 1845, to sell and convey or release the same lands and hereditaments to the said Company; and the said lands and hereditaments so required as aforesaid were, on the said notices so served on you as aforesaid, for better description, delineated on the plan attached to each of the said notices, or delivered therewith, and were therein distinguished by a red colour: and whereas they have stated the particulars of their claim in respect of the said lands and hereditaments to be, that such lands and hereditaments are of copyhold tenure, and you claim the sum of 3344*l.* 17*s.* 6*d.* as compensation for the same lands and hereditaments, and they and the said Company have not agreed as to the amount of compensation to be paid by the said Company for the interest in such lands belonging to them, or which they are, by the acts before recited and referred to, enabled to sell, and for the damage to be sustained by them by reason of the execution of the works of the said railway: and whereas the said Thomas Landor, Richard Hughes, and Robert Hughes have, by notice in writing, bearing date the 15th day of May instant, signified to the said Company their desire to have the question of such compensation settled by arbitration: now I the undersigned, Jonathan Samuda, Secretary to the said North Staffordshire Railway Company, do hereby nominate and appoint Thomas Kempson, of &c., as arbitrator on behalf of the said Company, to whom, with the arbitrator appointed by the said Thomas Landor, Richard Hughes, and Robert Hughes, shall be referred the question as to the amount of compensation to be paid by the said Company for the purchase of the said lands and hereditaments, or of the interest of the said Thomas Landor, Richard Hughes, and Robert Hughes therein, or for the interest of any other person or persons which, by the said acts hereinafter recited or referred to, you the said Thomas Landor, Richard Hughes, and Robert Hughes are enabled to sell, and also for the damage that

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may be sustained by the said Thomas Landor, Richard Hughes, and Robert Hughes, or such person or persons as aforesaid, by reason of the execution of the works of the said Company.—Dated &c.

“J. SAMUDA,

“Secretary to the said North Staffordshire Railway Company.”

The arbitrators appointed an umpire, under the 27th section of the Lands Clauses Consolidation Act, and several meetings took place, at which one Thomas Wright claimed compensation, on the ground that he had an agreement for a renewal of an expired lease of the land in question, for a term of seven years from Christmas, 1846, for the purpose of making bricks, under which agreement he had paid rent, and on the faith of which he had expended a large sum of money in building sheds and erecting a steam-engine. The two arbitrators having failed to make their award within the time limited by the 31st section of the above act, on the 8th of November the umpire made his award, the material part of which is as follows:—

“I do hereby award and determine that the sum of 1861*l.* 2*s.* 6*d.* is the value, and shall be paid by the said North Staffordshire Railway Company to the said Thomas Landor, Richard Hughes, and Robert Hughes, as such trustees as aforesaid, for the purchase of the fee-simple in possession, free from all incumbrances, of and in the said copyhold lands, tenements, and hereditaments described in the said first-recited notice, and delineated in the plan thereunto attached or delivered therewith, and therein coloured red, and required to be purchased and taken as aforesaid. And that the further sum of 1040*l.* 18*s.* 4*d.* shall be paid by the same Company to the said Thomas Landor, Richard Hughes, and Robert Hughes, as such trustees as aforesaid, as compensation for the damage that has been or will be sustained by the said Thomas Landor, Richard

Hughes, and Robert Hughes, as such trustees as aforesaid, by reason of the execution of the said railway and works, and also of the severing of the same lands and hereditaments from the other lands of the said Thomas Landor, Richard Hughes, and Robert Hughes, as such trustees as aforesaid, or otherwise injuriously affecting such other lands, by the exercise of the powers of the said Lands Clauses Consolidation Act 1845, or of the act or acts authorising the said railway and works, or any act incorporated therewith," &c.

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On the 16th of December the Company's solicitor sent to the solicitor of Landor and the others a copy of the award, at the same time giving notice of Wright's claim, and stating, that, in the event of his taking proceedings against the Company to obtain compensation, they should deduct the amount from the purchase-money. On the 20th of December the solicitor of Landor and the others returned for answer, that they considered Wright had no claim on them for compensation, and that they could not allow the Company to make any deduction from the purchase-money awarded. On the 27th of December, 1847, the solicitor of Wright gave notice to the Company not to pay to Landor and the others the sum awarded until an arrangement had been made with Wright. The following are the substantial grounds upon which the rule nisi was obtained:—

“ That the umpire has not, in or by his award, decided what is the amount of compensation to be paid by the North Staffordshire Railway Company for the interest of Thomas Landor, Richard Hughes, and Robert Hughes, in the lands and hereditaments, in the award mentioned, required by the Company to be purchased and taken. That the said Thomas Landor, Richard Hughes, and Robert Hughes, having a limited interest only in the said lands and hereditaments, and not being enabled, by the said acts of Parliament in the award mentioned or otherwise, to sell the interest there-

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in of Thomas Wright, in the affidavit in this case mentioned, and such interest of the said T. Wright having been notified to and proved before the said umpire, he, the said umpire, ought to have awarded a distinct sum for the said interest of the said Thomas Landor, Richard Hughes, and Robert Hughes: by his only awarding a gross sum for the fee-simple in possession, free from all incumbrances, it cannot be ascertained what amount is to be paid to the said Thomas Landor, Richard Hughes, and Robert Hughes, for their interest in the said lands and hereditaments, and that there is no machinery in the said acts or either of them to apportion or ascertain the proportion of the said sum of 1861*l.* 2*s.* 6*d.* in the said award mentioned which is to be paid to them, and the proportion thereof which is to be paid to the said T. Wright, or to any other incumbrancer or person entitled to any interest in the said lands and hereditaments. That the award is bad, because the said Thomas Landor, Richard Hughes, and Robert Hughes did not, in and by their notice in the said award mentioned, or in or by their claim therein mentioned, or by the said appointment of arbitrator therein mentioned, or otherwise howsoever, state the nature of the interest belonging to them in the said lands and hereditaments in respect whereof they claimed compensation, or the particulars of their estate and interest in the said lands and hereditaments in respect whereof they claimed compensation."

Martin shewed cause.—The Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, contains a code of laws, commencing at sect. 16, respecting the purchase of lands otherwise than by agreement. Where the compensation claimed does not exceed £50, the same is to be settled by two justices—sect. 22; but where it exceeds that amount, it may be settled by arbitration or a jury, at the option of the party claiming compensation. By sect. 18, where the promoters of the undertaking require to purchase any lands, they shall give notice to all parties interested in such lands, and demand

the particulars of their estate and interest, and of the claims made by them in respect thereof. By sect. 23, "if the compensation claimed or offered exceeds £50, and the party claiming compensation desires to have the same settled by arbitration, and signifies such desire by notice in writing to the promoters of the undertaking before they have issued their warrant to the sheriff to summon a jury, stating, in such notice, the nature of the interest in respect of which the party claims compensation, and the amount of compensation so claimed, the same shall be so settled accordingly." By sect. 25, "when any question of disputed compensation, authorised or required to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator, to whom such dispute shall be referred; and every appointment of an arbitrator shall be made, on the part of the promoters of the undertaking, under the hands of the said promoters or any two of them, or of their secretary or clerk, or, on the part of any other party, under the hand of such party, or, if such party be a corporation aggregate, under the common seal of such corporation, *and such appointment shall be deemed a submission to arbitration on the part of the party by whom the same shall be made,*" &c. The 27th section enables the arbitrators to appoint an umpire. By sect. 36, the submission may be made a rule of court. The 37th section enacts, that "no award made with respect to any question referred to arbitration, under the provisions of that or the special act, shall be set aside for irregularity, or error in matter of form." The notice by Landor and the others of their claim to the lands in question, and the appointment by them of an arbitrator, was a valid proceeding under the 23rd section; or, if not, the objection has been waived by the conduct of the parties. [*Parke, B.*—Reading the terms of the appointment together with the terms of the award, it does not appear

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what interest these parties had in the lands, nor what is the value of the interest which they are capable of conveying. The umpire only awards that 1861*l.* 2*s.* 6*d.* is the value, and shall be paid for the purchase of the fee-simple.] The award in substance finds that the interest of the parties is a fee-simple in possession, and that 1861*l.* 2*s.* 6*d.* is the value of that interest. If they fail to make out a title to the fee-simple, free from all incumbrances, the proper course is to proceed under the 76th and three following sections, by which the purchase-money may be deposited in the Bank and distributed by the Court of Chancery. [*Parke, B.*—The award is bad for uncertainty. It is made in pursuance of the submission, but that is not according to what the statute prescribes. As at present advised, it seems to me that the award could not be enforced by attachment; and on the other hand, it could not be set aside, because the parties, by their conduct, have agreed to that submission, though not according to the statutory form. The award ought to find the particular interest of the parties, whether an estate in fee or for life, or what other interest. In this case, perhaps, the umpire could not decide whether Landor and the others were entitled to the fee-simple or a mere equitable interest, because they have not stated, in their notice, what interest they possess. The question then is, what did the parties mean to refer? The appointment of an arbitrator is good evidence against them of what they intended. They agreed to refer the value of all the interest which Landor and the others were capable of conveying, and the difficulty is in saying what the arbitrators are to do on that reference. The umpire has neither valued the interest of Landor and the others, nor has he found, as a fact, that they were entitled to the fee-simple; he only says, that the value of the fee-simple, if they have the power of conveying it, is 1861*l.* 2*s.* 6*d.* *Platt, B.*—The umpire ought to have awarded to Landor and the others a compensation for their interest, minus that of Wright.]

The Court then called on

Crompton to support the rule.—It clearly appears that there was a tenancy from year to year outstanding in *Wright*, which the umpire has omitted to notice. The meaning of the appointment, which the statute makes a submission, is this, that the interest of the parties which they are capable of conveying, and its value, shall be the matter which the arbitrators shall ascertain. Here the umpire has not found what interest *Landor* and the others possessed; for, there being an outstanding term in *Wright*, the umpire only finds that a certain sum is the value of the fee-simple, leaving the parties to divide it. But the compensation to be paid to a tenant from year to year must, under the 121st section, be determined by two justices. It is said, that the conduct of the parties may render the submission valid, though not according to the statutory form; but the Company, being a corporation, cannot agree to any other mode of submission. [*Parke*, B.—If the Company are not bound by anything but the statutory submission, they can neither maintain an action nor proceed by attachment. *Pollock*, C. B.—There is no necessity for the assistance of the Court.]

PER CURIAM (a). — The rule must be discharged, but without costs.

(a) *Pollock*, C. B., *Parke*, B., *Rolfe*, B., and *Platt*, B.

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May 4. In the Matter of an Arbitration between THE NORTH STAFFORDSHIRE RAILWAY COMPANY and CHARLES WOOD and RICHARD WOOD.

A Railway Company having given notice to the owners of certain land, delineated in a plan annexed, to treat for the purchase thereof, the landholders thereupon gave the Company a notice, stating that their interest in the said land was particularly described in a schedule of claim served therewith; and that they claimed as compensation for the same, and for damage sustained by the execution of the railway, £2280; and that, upon payment of such sum, they were willing to convey all their estate in the said land; and that, if the amount were

not paid, they desired the matter to be settled by arbitration, and required the Company to appoint an arbitrator. In the schedule of claim annexed to this notice were included certain pieces of land, which the owners, under the 93rd section, required the Company to purchase as lands severed by the railway, and respectively of less than half an acre. The Company then gave the landholders a notice, whereby, after reciting the landowners' notice, they appointed an arbitrator, to whom was to be referred the amount of compensation to be paid to the landowners "for the purchase of the said lands." The arbitrators appointed an umpire, who received evidence of the value of the pieces of land less than half an acre, and awarded one entire sum for the purchase of the fee-simple of the land which the Company required to purchase, and also of the portions of land which the owners required the Company to purchase:—*Held*, that the award was bad, there being no valid submission in respect of the last-mentioned lands; but the Court refused to set the award aside, leaving the Company to dispute it when the parties should attempt to enforce it.

Whether the award could be supported by reference to the conduct of the parties, *quære*.

THIS was a rule calling on Charles Wood and Richard Wood to shew cause why an award or umpirage should not be set aside, under the following circumstances:—On the 30th December, 1846, the North Staffordshire Railway Company, in pursuance of the 18th section of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, gave the Messrs. Wood notice to treat for the purchase of certain lands situate at Sutton, in the parish of Prestbury, in the county of Chester, and numbered 374, 375, 376, and 377, in the plans and books of reference of the Company, and delineated in a plan thereunto annexed. This property consisted of a reservoir or pool of water for supplying water-wheels in Macclesfield. On the 4th of June, 1847, the Company served the Messrs. Wood with another notice to treat for the purchase of other land adjoining the land previously referred to, and numbered 372 and 372 *a*. This land was used solely for agricultural purposes. On the 23rd of June, the Messrs. Wood gave notice of the appointment of an arbitrator, the material part of which is as follows:—"We do hereby inform you, that we are the owners in fee-simple and in copyhold tenure, and also lessees for a certain term yet unexpired, of the lands, tenements, and hereditaments

mentioned or referred to in the said notices; and that such our interest therein, whether of a freehold, copyhold, or leasehold nature, is particularly described in the owner's schedule of claim served herewith; and that we claim, as compensation for the purchase-money for the same, and for the damage that may be sustained by us by reason of the execution of your railway works, the sum of 2280*l.* 8*s.* And take notice, that we are ready and willing, on payment of the said sum of 2280*l.* 8*s.*, to sell, convey, release, surrender, and assign to you, the said Company, all our estate, right, title, and interest in the said lands, tenements, and hereditaments, according to the provisions contained in the said acts of Parliament in your said notices mentioned. And we do further give you notice, that we shall require you, in addition to such compensation, to preserve and reconnect, in a proper and efficient manner, and without delay, all existing communications for the conveyance of water from the larger moss pool to our present mills and factories in Sutton aforesaid. And further take notice, that if our said claim of 2280*l.* 8*s.*, as and for compensation as aforesaid, shall not be paid or accepted by you, we hereby, in pursuance of the provisions contained in the said act, or any other act or acts of Parliament, signify to you our desire to have the amount of the said compensation to be paid to us settled by arbitration. And we do hereby require you, the said Company, to appoint an arbitrator," &c. In the schedule annexed to this notice, the Messrs. Wood claimed 971*l.* 18*s.* for the value of the land, 152*l.* 10*s.* as compensation for the severance and injury to the adjoining land, £683 for damage done to the water privileges and severance, and £473 for the purchase of parts of 372 *a*, 374, and 375, as not being lands within a town, and built upon, and which would be cut through and divided by the railway, so that they would be left respectively of less quantity than half a statute acre. On the 7th September, the Company served the Messrs. Wood with notice of the appointment

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of an arbitrator. This notice, after reciting the substance of the Company's two notices to treat for the purchase, and also that Messrs. Wood had stated the particulars of their claim in respect of the said lands to be 2280*l.* 8*s.*, proceeded in the following terms:—"Now we, the said North Staffordshire Railway Company, hereby, under the hand of me, the undersigned J. Samuda, secretary to the said Company, nominate and appoint George Clarke Pauling, of &c., arbitrator, to whom shall be referred the question as to the amount of compensation to be paid by the said Company for the purchase of the said lands and hereditaments, or of the interest of the said Richard Wood and Charles Wood therein, and for the interest of any other person or persons, which, by the said acts hereinbefore recited or referred to, they, the said Richard Wood and Charles Wood, are enabled to sell, and also for the damage that may be sustained by the said Richard Wood and Charles Wood, or such person or persons as aforesaid, by reason of the execution of the works of the said Company."

The two arbitrators nominated an umpire, who, together with them, proceeded with the reference, when the Messrs. Wood gave evidence of the value of certain portions of the land, numbered in their schedule 372 *a*, 374, and 375, the same being lands not within a town and built upon, and which would be cut through and divided by the railway, so that they would be left of less quantity than half an acre respectively; and they contended, that the Company were bound, under the 93rd section, to purchase these portions of land. This evidence was received by the arbitrators, although it was objected to by the Company, on the ground that it was not included in the lands specified or alluded to in the Company's appointment of an arbitrator, which constituted their submission to arbitration. The arbitrators having failed to make their award within the time limited by the act of Parliament, the umpire made his award, whereby (after reciting the notices, and also reciting that the Messrs. Wood

required the Company to purchase, along with the lands required for the purposes of the said railway and works, parts of the lands numbered 372 *a*, 374, and 375, the same being lands not within a town or built upon, which would be cut through and divided by the said railway and works, so that they would be left respectively of less quantity respectively than half a statute acre, and that they had no land adjoining into which the same could be thrown, so as to be conveniently occupied therewith) he awarded as follows: —“I do hereby award and determine, that the sum of £1444 is the value, and shall be paid by the said North Staffordshire Railway Company to the said Charles Wood and Richard Wood, for the purchase of the fee-simple in possession and copyhold tenure and interest, free from all incumbrances, except the usual copyhold rent and services in respect of the said copyhold land and hereditaments, and also the leasehold interest, as set forth in the said claim of the said Charles Wood and Richard Wood, of and in the said lands, tenements, and hereditaments, described in the before-recited notices, and delineated in the plans to the same notices respectively attached or delivered therewith, and therein coloured red, and required to be purchased and taken by the said Company as aforesaid, and also required by the said Charles Wood and Richard Wood, in their notice and claim delivered to the Company, to be purchased and taken by the said Company as aforesaid; subject, nevertheless, as to the said leasehold tenements, to a proportionate part of the said rent of £210, to which the same, with other tenements, is subject and liable, according to the quantity of land taken, and to be apportioned under the provisions of the Lands Clauses Consolidation Act 1845. And that the further sum of £732 shall be paid by the same Company to the said Charles Wood and Richard Wood, as compensation for the damage that has been or shall be sustained by the said Charles Wood and Richard Wood, by reason of the execution of the said railway and works, and also of the severing of the

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same lands, tenements, and hereditaments from the other lands, tenements, and hereditaments of the said Charles Wood and Richard Wood, or otherwise injuriously affecting such other lands, by the exercise of the powers of the said Lands Clauses Consolidation Act 1845, or of the act or acts authorising the said railway and works, or any act incorporated therewith."

The following were the principal grounds on which the Company moved to set aside the award:—That the umpire has exceeded his authority by awarding one gross sum for the purchase of the land required to be purchased and taken by the North Staffordshire Railway Company, and of the land required by Charles Wood and Richard Wood, in their notice and claim in the said award mentioned, to be taken and purchased by the said Company, inasmuch as the umpire had no authority to award any sum in respect of the last-mentioned land—that is to say, the land required by the said Charles Wood and Richard Wood, to be taken and purchased as aforesaid—or to make any award or umpirage as to such last-mentioned land; and as it cannot be known or ascertained from the said award how much of the said sum of money so awarded for the purchase is awarded in respect of the land required by the said Company, and how much is awarded in respect of the land required by the said Charles Wood and Richard Wood to be taken, the award is, therefore, bad altogether. That the umpire has included in his award, and awarded upon a matter not submitted to him—that is to say, the amount of the purchase-money of the land not required by the Company to be taken, but required by the said Charles Wood and Richard Wood to be taken. That the award or umpirage is void, as the two parties thereto never agreed upon the same subject-matter for the arbitrators or umpire to decide; and that the said Company only agreed that the award should be as to the land required by them to be taken; whereas the said Charles Wood and Richard

Wood agreed that the award should be both as to the land required by the Company to be taken, and the land required by themselves, the said Charles Wood and Richard Wood, to be taken; and the said Charles Wood and Richard Wood never agreed to be bound by any award or umpirage which should not include the amount to be paid for the purchase of the said last-mentioned land.

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Martin and Townsend shewed cause.—The objection, in substance, is, that the umpire ought not to have awarded in respect of the parts of 372 a, 374, and 375, which were severed by the railway, so that they were respectively of less than half an acre. The 93rd section of the Lands Clauses Consolidation Act enacts, that, “if any lands, not being situate in a town or built upon, shall be so cut through and divided by the works as to leave, either on both sides or on one side thereof, a less quantity of land than half a statute acre, and if the owner of such small portion of land require the promoters of the undertaking to purchase the same, along with the other land required for the purposes of the special act, the promoters of the undertaking shall purchase the same accordingly, unless the owner thereof shall have other land adjoining to that so left, into which the same can be thrown so as to be conveniently occupied therewith,” &c. According to the true construction of the act, the Company are to give notice of the land they require to purchase; then, if the owners have any land within the description of the 93rd section, they are to give a notice requiring the Company to purchase that land, and thereupon the Company are bound to do so. The two notices, taken together, make a valid submission in respect of the portions of land less than half an acre; for the Company, in their notice, refer, in express terms, to the claim of £2280, by Messrs. Wood, as compensation for the land mentioned in their notice—that is, both the land which the Company required to purchase and that which they were bound, by the 93rd

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section, to purchase. [*Parke, B.*—The Company only propose to refer the amount of compensation to be paid for the land which they are willing to take.] Upon notice by the Company, a two-fold right accrued to the owners of the land, namely, a right to compensation for the value of the land which the Company require to purchase, and a further right of insisting upon the purchase, by the Company, of the portions of land less than half an acre. The parties are concluded by their conduct before the arbitrator, for they acted as if the matter referred were the value of the entire lands: *Regina v. The Trustees of Swansea Harbour(a)*. [*Parke, B.*—It is clear that the umpire has fixed the sum awarded as the value of the entire lands. The award is bad, but whether we ought to set it aside is another question. *Pollock, C. B.*—If the objection is quite patent, there is no necessity for our interference.]

Crompton, in support of the rule.—The umpire has awarded upon a subject-matter in respect of which he was not authorised to adjudicate by either party, or, at all events, by the Company. It is true that the schedule annexed to the notice of Messrs. Wood includes the entire lands; but that schedule is a mere description of their estate or interest, and forms no part of the appointment of the arbitrator. The notice by Messrs. Wood is distinctly con-

award, for it is clearly bad. The two notices evidently refer ad idem; therefore, nothing is submitted to the arbitrators but the value of the land which the Company required to purchase. Whether the award can be supported by anything irrespective of this submission is another matter.

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ROLFE, B., and PLATT, B., concurred.

Rule discharged (a).

(a) See the preceding case.

GROTE v. THE CHESTER AND HOLYHEAD RAILWAY
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CASE.—The declaration, after reciting that the defendants had been established and incorporated, by a certain act of Parliament, for the making of a railway, called the Chester and Holyhead Railway Company, and that the defendants, in pursuance of that act, had constructed a portion of the line, and also, amongst other works, a bridge over the river Dee; and that, before and at the time of the grievances thereafter mentioned, a certain other Railway Company, to wit, the Shrewsbury and Chester Railway Company, by the license and permission of the defendants, and for hire and reward therefore paid by them, used the said part of the said railway of the defendants, and the said

In an action against a Railway Company, for compensation for injury received by the plaintiff by the breaking down of a bridge, over which he was passing in a passenger-train — *Held*, that it was a proper question for the jury, whether the defendants had engaged the services of competent engin-

eers, who had adopted the best method and had used the best materials, and that, if the defendants had done so, they would not be liable; but that the mere fact of their having engaged the services of such a person would not relieve them from the consequences of an accident arising from a deficiency in the work.

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bridge and other works of the defendants, for the carriage and conveyance of passengers on and over the said part of the railway, in certain carriages of the Shrewsbury and Chester Railway Company, and at certain great speed and velocity, for reward therefore paid by the said passengers to the last-mentioned Company; of all which premises the defendants, during all the time aforesaid, had due notice, and the defendants, during all the said time, had full notice, as the fact was, that the said part of the said railway of the defendants could not safely or securely be used as aforesaid, nor the said passengers safely or securely carried or conveyed on or over the said part of the said railway of the defendants, unless as well the said part of the said railway of the defendants as the said bridge and other works were, by the defendants, carefully and skilfully, and with proper and sufficient materials, constructed and maintained: and after reciting, that, after the said part of the said railway of the defendants had been made, and the said bridge and other works made and constructed as aforesaid, and whilst the said part of the said railway and the said bridge and other works were so used by the said Shrewsbury and Chester Railway Company in manner and for the purposes aforesaid, and whilst the defendants had such notice as aforesaid, to wit, &c., the plaintiff became and was a passenger on the said part of the said railway of the defendants, to be safely and securely carried and conveyed by the said Shrewsbury and Chester Railway Company, in one of their carriages, on and over the said part of the said railway of the defendants, for hire and reward to the said Shrewsbury and Chester Railway Company therefore paid by the plaintiff to the said last-mentioned Company; and the said last-mentioned Company then received the plaintiff, to be so carried and conveyed as aforesaid; yet that the defendants, disregarding their duty, did not nor would skilfully, carefully, sufficiently, and properly construct, make, and main-

tain the said part of the said railway of the defendants, and skilfully, carefully, sufficiently, and properly make, construct, and maintain the said bridge and other works, so that the same respectively could safely and securely be used in manner and for the purposes aforesaid; but, on the contrary thereof, the defendants so negligently, unskilfully, insufficiently, and improperly made and maintained the said part of the said railway of the defendants, and so negligently, unskilfully, insufficiently, and improperly made, constructed, and maintained the said bridge and other works, that the said part of the said railway of the defendants, and the said bridge and other works respectively, could not be safely or securely used in manner and for the purposes aforesaid; and that whilst the plaintiff, as such passenger as aforesaid, was being carried and conveyed in manner and on the occasion aforesaid, by the said Shrewsbury and Chester Railway Company, in one of their carriages, on and over the said part of the said railway of the defendants, and before the commencement of this suit, to wit, on &c., by and through the aforesaid negligence, carelessness, and improper conduct of the defendants in and about the making and maintaining of the said part of their said railway, and in and about the making, constructing, and maintaining of the said bridge and other works, the said bridge became and was broken and dislocated, and the plaintiff was precipitated and thrown from the said bridge, and thereby became and was greatly cut, wounded, and bruised, &c.; concluding by laying special damage.

The defendants pleaded, "Not guilty." Upon which, issue was joined.—At the trial, before *Williams, J.*, at the last Spring Assizes for Chester, it appeared, that the present action had been brought by the plaintiff against the defendants, to recover compensation for an injury received by him, which had been occasioned by the breaking down of a bridge, upon a portion of their line, during

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the transit of a passenger-train in which the plaintiff then happened to be. It also appeared, that the services of an eminent engineer had been engaged in the construction of the work. The learned judge told the jury, that the question was, whether the bridge was constructed and maintained with sufficient care and skill, and of reasonably proper strength with regard to the purposes for which it was made; and that, if they should think not, and that the accident was attributable to any such deficiency, the plaintiff would be entitled to recover. The counsel for the defendants objected, that the defendants would not be liable unless they had been guilty of negligence either in constructing or maintaining the bridge. His Lordship, however, left the question to the jury, subject to his previous direction. A verdict having been found for the plaintiff,

The *Attorney-General*, in the present Term, (April 19), moved for a rule calling on the plaintiff to shew cause why there should not be a new trial, on the ground of misdirection.—The jury were not properly directed. The learned judge should have left it to them to say, whether the defendants had been guilty of any negligence. In the mode in which the question was left to the jury, they were necessarily forced, by the result, to the conclusion, that the bridge had not been constructed with sufficient care and skill; for they would reason, that if it had been properly constructed it would not have failed. The jury would, therefore, necessarily find that there had been negligence, from the result. It appeared, that the defendants had engaged the services of the most competent engineer in the construction of the bridge. They had done their duty. [*Parke, B.*—It seems to me that they would still be liable for the accident, unless he also used due and reasonable care, and employed proper materials in the work.] The learned judge ought to have put the question of negligence to the jury with more dis-

tinctness. The skill exercised in the construction of the work ought not to be tested by the result. The rule seems to be correctly laid down by *Alderson*, B., in *Sharp v. Grey* (a), where he says, "A coach-proprietor is liable for all defects in his vehicle which can be seen at the time of construction, as well as for such as may exist afterwards and be discovered on investigation." [*Parke*, B.—In that case, the coach-proprietor is liable for an accident which arises from an imperfection in the vehicle, although he has employed a clever and competent coach-maker.]

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POLLOCK, C. B.—It does not at present distinctly appear whether or not the attention of the jury was directed to the proposition, that if a party, in the same situation as that in which the defendants are, employ a person who is fully competent to the work, and the best method is adopted, and the best materials are used, such party is not liable for the accident. If the jury have been directed in conformity with this rule, there is no ground for the present application. It cannot be contended that the defendants are not responsible for the accident, merely on the ground that they have employed a competent person to construct the bridge. Upon this point we will consult our learned Brother.

Cur. adv. vult.

POLLOCK, C. B., now said, that they had consulted the learned judge, who reported to them that he had directed the jury in conformity with the above proposition, and that, therefore, there would be no rule.

Rule refused.

(a) 9 Bing. 459.

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The enjoyment of land producing titheable matters, without payment of tithe, for the period prescribed by the 2 & 3 Will. 4, c. 100, if adverse and as of right, creates a valid and indefeasible exemption from and discharge of tithes.

But the non-payment of tithes of a particular thing for such period, in respect of lands for which tithes of other titheable produce have been paid within the statutable period, does not operate as an exemption from the payment of the tithes of that particular thing.

THE following case was sent, by order of the Lord Chancellor, for the opinion of this Court.

The plaintiff was, in the month of January, 1833, collated and instituted to, and inducted into, the vicarage of the parish and parish church of Crosby-upon-Eden, in the county of Cumberland; and in the month of December, 1835, filed his bill of complaint, in the Court of Exchequer, against the defendants (occupiers of land within the said parish), claiming, as vicar of the parish, to be entitled to all the tithes arising and renewing within the parish, except the tithes of corn and grain, and demanding an account and payment by the defendants respectively of the single value of the tithes of turnips, potatoes, cabbages, tares, grass, clover, rye-grass, saintfoin, and other artificial grasses not made into hay, but used as and for green fodder, or carried off the land in a green state, and other green crops had and taken by the defendants respectively, upon and from off their respective lands in the said parish, since the plaintiff's collation and induction; and of the tithes of the agistment of barren and unprofitable cattle, fed and agisted by the defendants respectively, on their said respective lands, during the same period, and which tithes were alleged by the bill to have been subtracted by the defendants respectively.

The defendants, by their answers, denied that the plaintiff, as vicar of the said parish of Crosby-upon-Eden, was entitled to the said tithes demanded by his said bill.

The defendants alleged, that the lands in the parish in their respective occupation had respectively been enjoyed without payment or render of any tithes of the titheable matters and things, the tithes whereof were demanded by the bill, or any of them, or money or other matters in lieu thereof, or any of them, to the vicar of the parish, for and

during the whole time that two persons in succession had held the vicarage, and for not less than three years after the institution of a third person thereto, and during such number of years as were sufficient to make up the full period of sixty years, and also the further period of three years after the institution of a third person to the said vicarage.

The defendants further alleged by their answers, that, in case the plaintiff ever had any right to the said tithes, such right had been barred in respect of all the said several titheable matters and things, the tithes whereof were demanded by the plaintiff, by virtue of the act made and passed in the second and third years of his late Majesty King William the Fourth, intituled "An Act for shortening the Time required in Claims of Modus Decimandi, or Exemption from or Discharge of Tithes;" and that the same had been so barred in respect of all the lands in the occupation of the defendants respectively.

The defendants did not by their answers allege any ground of exemption from, or discharge of, tithes of the titheable matters and things, the tithes whereof were demanded by the plaintiff's bill, for the lands in their respective occupation, otherwise than by the enjoyment of such lands without payment of such tithes or money, or other matter in lieu thereof, for the above-mentioned period, and by the operation of the above-mentioned act of Parliament. The plaintiff did not on his part allege or set forth any proviso, exception, incapacity, disability, contract, agreement, deed, or writing, in the act mentioned, or any other matter of fact or of law, not inconsistent with the simple fact of the exercise and enjoyment of the exemption claimed by the defendants of their respective lands from, or discharge of such lands of the tithes of the said titheable matters and things, the tithes whereof were demanded by the plaintiff's bill, upon which he intended to rely.

The defendants, by their evidence in the cause, proved

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that the lands in their respective occupation had been enjoyed by themselves and the former occupiers thereof, without payment or render of tithes of the titheable matters and things, the tithes whereof were demanded by the bill, or money or other matter in lieu thereof, to the vicars of the said parish, for and during the whole time that the Reverend William Giteon, who became vicar of the said parish in the year 1730, and the Reverend Henry Shaw, who succeeded the said William Giteon in the vicarage in the year 1756, held the said vicarage, and for and during the period of three years after the collation, institution, and induction of the Reverend Thomas Lowry, who succeeded the said Henry Shaw in the year 1791, to and into the said vicarage; and further, for and during the whole of the remainder of the time that the said Thomas Lowry, who was vicar of the said vicarage when the said act of Parliament was passed, held the said vicarage, and down to the time when the plaintiff, who succeeded the said Thomas Lowry in the said vicarage, filed his said bill of complaint against the said defendants.

The plaintiff went into no evidence touching the exemption from, or discharge of, the defendants' respective lands from the payment of the tithes demanded by his bill.

The cause, having been transferred from the Court of Exchequer to the Court of Chancery, came on to be heard before the Right Honourable Vice-Chancellor Sir *James Wigram*, on the 6th and 10th days of November, 1841, and stood for judgment on the 8th day of February, 1842, when his Honour made his decree in favour of the plaintiff, for an account and payment by the defendants of the tithes demanded by the plaintiff's bill.

Against this decree the defendants presented their petition of appeal to the Right Honourable the Lord Chancellor, which appeal came on to be heard before his Lordship on the 17th and 18th days of November, 1843; and, on the 21st day of the same month, his Lordship was pleased to order this case to be stated for the opinion of her Majesty's

Justices of the Court of Common Pleas, relative to the construction of the above act of the 2 & 3 Will. 4.

Her Majesty's justices of the said Court of Common Pleas having sent their certificate to the Right Honourable the Lord Chancellor, the said cause came on to be again heard before his Lordship on the 19th day of November, 1846, when his Lordship was pleased to order this case to be stated for the opinion of her Majesty's Court of Exchequer.

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The plaintiff and his predecessors, vicars of the said parish of Crosby-upon-Eden, have always received the tithes in kind, or moduses or compositions for the tithe of hay, (with certain exceptions), and of milk, calves, wool, lambs, foals, bees, pigs, geese, and eggs and line. Tithes of gardens, orchards, and hemp have not been paid in the parish.

It is to be assumed, that the plaintiff is entitled to the tithes of the titheable matters and things, the tithes whereof are demanded by his bill from the defendants' respective lands, unless, under the circumstances mentioned in this case, such lands are exempt from, or discharged of, such tithes.

[It is also to be assumed, for the purposes of this case, that, as to some parts of the lands in question, no tithe of any kind, nor any money or other matter in lieu thereof, have or has been paid or rendered during the period above mentioned, (that is to say, during the period when the Rev. W. Gibson, the Rev. Henry Shaw, the Rev. Thomas Lowry, and the plaintiff were so as aforesaid vicars of the said parish), although during such period not only the titheable matters and things, the tithes whereof are demanded by the plaintiff's bill, but other titheable matters and things, grew and arose from time to time and at various times upon such parts of the said lands.

[It is also to be assumed, for the purposes of this case, that, as to other parts of the lands in question, no tithes of the titheable matters and things, the tithes whereof are demanded by the plaintiff's bill, nor any money or other mat-

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ter in lieu thereof, have or has been paid or rendered during the said periods above mentioned, although at various times during such periods the titheable matters and things, the tithes whereof are demanded by the plaintiff's bill, grew and arose upon such last-mentioned lands, and although at various other times during the same periods other titheable matters and things (including corn, grain, and hay) grew and arose upon the last-mentioned lands, and the tithes of all the last-mentioned matters and things have from time to time been paid and rendered (a).]

And it is ordered that the question for the opinion of the judges of the Court of Exchequer upon this case be, whether, according to the true construction of the act of the 2 & 3 Will. 4, c. 100, intituled "An Act for shortening the Time required in Claims of Modus Decimandi, or Exemption from or Discharge of Tithes," a valid and indefeasible prescription or claim of exemption from or discharge of tithes of turnips, potatoes, cabbages, tares, grass, clover, rye-grass, saintfoin, and other artificial grasses not made into hay, but used as and for green fodder or carried off the land in a green state, and other green crops, and of the agistment of barren and unprofitable cattle, or any of such tithes, can be sustained, under the circumstances hereinbefore mentioned, for the said lands in the said parish of Crosby-upon-Eden, in the occupation of the defendants respectively, or any part of such lands.

The case was argued in Hilary Term, (Jan. 21 and 26), by

Manisty, for the plaintiff.—The case as amended raises two points: first, whether, under the 2 & 3 Will. 4, c. 100(b),

(a) At the suggestion of the Court, the case was amended by the insertion of the paragraphs within brackets.

(b) Sect. 1, after reciting that "the expense and inconvenience of suits instituted for the recovery of tithes may and ought to

be prevented, by shortening the time required for the valid establishment of claims of a modus decimandi, or exemption from or discharge of tithes," enacts, "that all prescriptions and claims of or for any modus decimandi, or of or to any exemption from, or dis-

certain lands are totally exempt from tithes, simply because no tithes whatsoever have been paid in respect of them

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charge of, tithes, by composition real or otherwise, shall, in cases where the render of tithes in kind shall be hereafter demanded by our said Lord the King, his heirs or successors, or by any Duke of Cornwall, or by any lay person, not being a corporation sole, or by any body corporate of many, whether temporal or spiritual, be sustained and be deemed good and valid in law, upon evidence showing, in cases of claim of a *modus decimandi*, the payment or render of such *modus*, and in cases of claim to exemption or discharge, showing the enjoyment of the lands without payment or render of tithes, money or other matter in lieu thereof, for the full period of thirty years next before the time of such demand, unless, in the case of claim of a *modus decimandi*, the actual payment or render of tithes in kind, or of money or other thing differing in amount, quality, or quantity from the *modus* claimed, or in case of claim to exemption or discharge, the render or payment of tithes, or of money or other matter in lieu thereof, shall be shewn to have taken place at some time prior to such thirty years, or it shall be proved that such payment or render of *modus* was made, or enjoyment had, by some consent or agreement expressly made or given for that purpose by deed or writing; and if such proof in support of the

claim shall be extended to the full period of sixty years next before the time of such demand, in such cases the claim shall be deemed absolute and indefeasible, unless it shall be proved that such payment or render of *modus* was made, or enjoyment had, by some consent or agreement expressly made or given for that purpose by deed or writing; and where the render of tithes in kind shall be demanded by any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other corporation sole, whether spiritual or temporal, then every such prescription or claim shall be valid and indefeasible, upon evidence showing such payment or render of *modus* made or enjoyment had, as is hereinbefore mentioned, applicable to the nature of the claim, for and during the whole time that two persons in succession shall have held the office or benefice in respect whereof such render of tithes in kind shall be claimed, and for not less than three years after the appointment and institution or induction of a third person thereto: provided always, that, if the whole time of the holding of such two persons shall be less than sixty years, then it shall be necessary to show such payment or render of *modus* made or enjoyment had, (as the case may be), not only during the whole of such time, but also during

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during the whole of the prescribed period: secondly, whether if some tithes have been paid and others not, there is an exemption from the latter. In order to come to a correct conclusion as to the first point, it is important to keep in view the law prior to the 2 & 3 Will. 4, c. 100. Before that statute passed there were several classes of exemptions: first, an absolute and total exemption by composition real confirmed by the stat. 32 Hen. 8, c. 7; secondly, where lands were exempt by *modus decimandi*; thirdly, an exemption *ratione ordinis*: fourthly, where the Crown or spiritual persons prescribed in non decimando;

such further number of years, either before or after such time, or partly before and partly after, as shall with such time be sufficient to make up the full period of sixty years and also for and during the further period of three years after the appointment and institution or induction of a third person to the same office or benefice, unless it shall be proved that such payment or render of *modus* was made, or enjoyment had, by some consent or agreement expressly made or given for that purpose by deed or writing."

SECT. 2 enacts, "that every composition for tithes which hath been made or confirmed by the decree of any court of equity in England, in a suit to which the ordinary, patron, and incumbent were parties, and which hath not since been set aside, abandoned, or departed from, shall be, and the same is hereby confirmed and made valid in law; and that no *modus*, exemption, or discharge shall be deemed to be within the provi-

sions of this act, unless such *modus*, exemption, or discharge shall be proved to have existed and been acted upon at the time of, or within one year next before, the passing of this act."

SECT. 7 enacts, that, "in all actions and suits to be commenced after this act shall take effect, it shall be sufficient to allege that the *modus* or exemption or discharge claimed was actually exercised and enjoyed for such of the periods mentioned in this act as may be applicable to the case; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, deed, or writing herein mentioned, or any other matter of fact or of law not inconsistent with the simple fact of the exercise and enjoyment of the matter claimed, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of the matter claimed."

fifthly, cases of simple non-payment, as in the instance of barren lands. A layman could never prescribe in non decimando, for mere non-payment for any period did not per se constitute an exemption. In exemption *ratione ordinis* time was utterly immaterial; but such exemption tends to illustrate what the legislature was dealing with. If it could be shewn that lands belonged to a privileged order before the Council of Lateran, payment or non-payment was not the question. That was expressly decided in the case of *The Earl of Clanrickard v. Lady Denton* (a), where *Dodderidge, J.*, says, "If this land were discharged of tithes in the hands of the prior, and the priory were vested in the king by the statute of 31 Hen. 8, so that such discharge as was in the priory ought by the law to remain, though tithes have been paid ever since the making of the statute, and they therefore pray sentence for the parson, yet a prohibition shall be granted after sentence; for by law this land was discharged of tithes, and this constant payment ever since the statute (admitting it to be so) does not make it chargeable by the laws of the realm; and therefore, if their sentence be contrary to the law of the realm, a prohibition ought to be granted." Then as to the statute 2 & 3 Will. 4, c. 100. The true mode of construing statutes is well explained by Sir *John Nicholl*, in *Brett v. Brett* (b), where the question was, whether a legacy to a subscribing witness to a mere will or codicil of personalty was void by the 25 Geo. 2, c. 6; and the Court held, that though the statute extended in terms to all wills and codicils whatsoever, yet it was limited in point of true construction to wills and codicils of real estate only. Sir *John Nicholl*, in delivering judgment, says, "The key to the opening of every law is the reason and spirit of the law—it is the '*animus imponentis*'—the intention of the law-maker expressed in the law itself *taken as a whole*."

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(a) 1 E. & Y. 306, 308.

(b) 3 Addams, 210.

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Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed detached from its context in the statute: it is to be viewed in connexion with its whole context—meaning by this as well the title and preamble as the purview or enacting part of the statute. It is to the preamble more especially that we are to look for the reason or spirit of every statute; rehearsing this as it ordinarily does, the evils sought to be remedied, or the doubts purported to be removed by the statute, and so evidencing in the best and most satisfactory manner the object or intention of the legislature in making and passing the statute itself.” The same mode of construction was adopted in the case of *Emanuel v. Constable* (a), (where it appears by a note that the judgment in *Brett v. Brett* was affirmed by the Delegates), and also in *Foster v. Banbury* (b), and *Stowel v. Lord Zouch* (c). In *Crespigny v. Wittenoom* (d), Buller, J., says, “I agree that the preamble cannot controul the enacting part of a statute, which is expressed in clear and unambiguous terms. But if any doubt arises on the words of the enacting part, the preamble may be resorted to to explain it.” Bearing in mind that, before the statute 2 & 3 Will. 4, c. 100, the words “exemption” and “discharge,” when used with reference to tithes, had a clear and definite meaning, the statute is intituled “An Act for *shortening the time* required in Claims of Modus Decimandi, or Exemption from or Discharge of Tithes;” and the preamble is, “Whereas the expense and inconvenience of suits instituted for the recovery of tithes may and ought to be prevented, by *shortening the time* required for the valid establishment of claims of modus decimandi, or exemption from or discharge of tithes.” Then the enacting part of the clause deals with two classes of cases: first, lands

(a) 3 Russ. 436.

(b) 3 Sim. 40.

(c) Plow. 369.

(d) 4 T. R. 790.

subject to a modus, or exemption or discharge from tithes, by composition real or otherwise; secondly, lands only exempt from payment of tithes in kind, or anything in lieu thereof. The words all claims "of or to any exemption," must be read as claims "of or to *some* exemption," that is, something must be stated as a lawful ground of exemption. The words "or otherwise" have reference to the words "composition real." In the case of a demand of tithes in kind by a corporation sole, enjoyment of the land for the full period of sixty years, without payment of tithes, money or other matter in lieu thereof, renders the exemption or discharge indefeasible, unless the payment was made or the enjoyment had by consent or agreement made or given by deed or in writing. The statute has only shortened the time during which it is necessary to prove that the exemption has been enjoyed: in other respects, the law remains as before. A claim to exemption "by composition real or otherwise" cannot include the case of a mere non-payment. In Com. Dig. "Parliament," (R. 14), it is said, "But if a statute begins with inferior persons, the general words do not extend to superior persons: as the statute W. 2. 41, si abbates, priores, custodes hospitalium et aliarum domorum religiosarum, does not extend to a bishop." Again, (R. 26), "Words which begin with inferior persons do not include superior." The law is stated in similar terms in *The Archbishop of Canterbury's case* (a). If the legislature had intended that mere non-payment should be a ground of exemption, they would have said so. In *Knight v. The Marquis of Waterford* (b), the Court said, that they saw no reason to believe that the framer of the statute used the word "modus" in any other than its proper sense. Then why is a different meaning to be put on the words "exemption" and "discharge?" The Court will not extend the words of a statute so as to create an exemption

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(a) 2 Rep. 46; 1 E. & Y. 113.

(b) 15 M. & W. 419.

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unknown to the law: *Bailiffs of Godmanchester v. Phillips* (a). "Exemption" and "discharge" must be taken to mean a "legal exemption and discharge." For some time after the passing of the 31 Hen. 8, c. 13, it was a question whether unity of possession at the time of the dissolution of the monastery did not of itself constitute a ground of discharge; but it was ultimately decided to be only a suspension of payment, so long as the unity held: Gibson's Codex, 673; *Doubitofte v. Curteene* (b). In the report of the latter case, in 1 Eagle and Younge, it is stated that the judges "resolved that unity of possession of the lands and rectory is not any extinguishment or suspension omnino of tithes, tithes being a mere collateral duty to the land, and not any way appertaining to it, as appears from 30 Hen. 8; Dy. 42 Edw. 3. 13, and 32 Hen. 8, c. 7." The same law is laid down in *Priddle and Napper's case* (c), *Slade v. Drake* (d), *Clavill v. Oram* (e). Mere unity of possession, therefore, did not operate as a discharge from tithes: *Anonymous case* (f), *Prowse's case* (g). In Co. Litt. s. 728, it is said, "The words of an act of Parliament must be taken in a lawful and rightful sense, as here the words being (whereof no fine is levied in the King's Court), are to be understood, whereof no fine is lawfully or rightfully levied in the King's Court." The same doctrine was acted upon in the construction of the Statute for payment of Tithes, 2 Ed. 6. c. 13, where the sense of the words "or of right or custom," is, "or by rightful custom:" 2 Inst. 650. So, here, a "composition real or otherwise," means otherwise by some lawful means. The landowner must, therefore, bring his claim within the law in this respect, in the same manner as he was obliged to do before the statute. The statute limits the time required for enjoyment,

(a) 5 R. & Ad. 198.

(b) Cro. Jac. 452; 1 E. & Y.

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(c) 11 Rep. 3 a; 1 E. & Y. 208.

(d) Hob. 295; 1 E. & Y. 314.

(e) 3 E. & Y. 1369.

(f) 1 E. & Y. 66; Godb. 1.

(g) Godb. 95.

but the origin of the exemption must still be defined. The mere enjoyment of the claim for the period prescribed by the act is not sufficient. The 2nd section may present some difficulty in its construction, but that section is not in the least degree opposed to the plaintiff's argument. The 7th section enacts, that it shall be sufficient to allege that the modus, or exemption or discharge, was actually exercised. How could that section be carried out, if mere non-payment were an exemption? If a claim to exemption is to be alleged, it must be necessary to establish it by proof. The claim must be capable of being pleaded and traversed. In *Earl of Stamford v. Dunbar* (a) it was held that, where a party pleads a claim of a modus decimandi, he may prove it by the same evidence as would have been sufficient before the present statute. The statute does not give any new claim. [He referred also to *Corporation of Bury St. Edmunds v. Evans* (b), and to *Salkeld v. Johnson* (c), and *Fellowes v. Clay* (d).] Taking, then, the different sections of the act in connexion with the enacting clause now under discussion, it is clear that mere non-payment cannot create an exemption. A fair test in construing this statute is to consider the case of others in *pari materiâ*, and especially that of 2 & 3 Will. 4, c. 71, the object of which was to shorten the time over which proof of right to land should extend; and the language there used shows how the present statute would have been worded, had such been the intention of the legislature. [He also referred to 6 & 7 Will. 4, c. 71.]

In the second place, there can be no doubt that the last question proposed must be answered in the negative. The terms of the act are not in any way applicable to such an exemption as is sought to be established: *Bayley v. Drever* (e). In that case, the Court of Queen's Bench

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(a) 13 M. & W. 822.

(c) 2 C. B. 749.

(b) 2 E. & Y. 72.

(d) 4 Q. B. 313.

(e) 1 Ad. & E. 449.

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intimated, that the perception of the corn tithe was at all events good *prima facie* evidence of a title to the tithe generally: see *Doubitofte v. Curteene* (a). [He also referred to *Re Appledore Commutation* (b), *Leyson v. Persons* (c), *Layng v. Yarborough* (d).]

Malins, contra.—The first question is, whether the mere non-payment of tithes for the period prescribed by the act under consideration is an exemption from the payment of all tithes; the second question is, whether the non-render of a particular kind of tithes, others having been paid during the period, is an exemption from the latter. It will not be irrelevant to the questions in dispute, to consider in the first place what the mischiefs were for which the legislature sought to provide a remedy. It has ever been the policy of the law of England to make the continued enjoyment of property conclusive evidence of the right; and the time required to establish such enjoyment has gradually been limited. By the writ of right, it was at first sixty years; that period has since been further reduced to twenty years. Tithes, however, formed an exception to this doctrine of limitation, and this was found to be the cause of excessive litigation. It was reasonable that so salutary a rule should be extended to the Church, and that her property should be placed on the same footing as that of the laity in this respect. It was not for the benefit of a parish that a new incumbent, upon his arrival, should be immediately plunged into litigation, in order to establish these claims, which, though originally just, had slept quietly and undisturbed during his predecessors' times. The rule with respect to a *modus* and total exemption may be admitted, viz. that in these two cases time afforded no conclusion against the rights of the Church. As to the claim of a *modus*, time, in

(a) Cro. Jac. 454.

(b) 8 Q. B. 139.

(c) 2 E. & Y. 648.

(d) 3 E. & Y. 854.

point of fact, was the only evidence of right; and if there was any evidence to go to the jury, the claimant was sure to establish his right; but still he was liable to be met by a single instance of payment, which was of three centuries' standing. With respect to a *modus*, therefore, time was the only evidence required to support it. The case of total exemption, however, rests upon a different ground. Mere non-payment was never sufficient to establish that right, but it was necessary to shew its legal origin. In such a case, the first step to be proved was, that the lands in question were in the hands of some great monastery at the time of the Dissolution, and non-payment in modern times was all that was required in that capacity; the prior exemption and modern non-payment were the essentials of total exemption. In both these cases Lord *Tenterden's* Act had to deal with time; but it is said that it does not apply to total exemption, because it deals with time only. In the case of total exemption, it was necessary to go back as far as the 13th Elizabeth for the proof, before which all compositions must have been entered into, in order to be valid. It was, therefore, a question of time in each case. In that of a total exemption, the claimant had to go back three centuries; in the other case, sixty years. As time, therefore, was the difficulty with which the landowner had to deal, it was the object of the legislature to remove that obstacle. The great expense of a tithe trial, where the claim was one of total exemption, consisted in shewing the origin of it, non-payment being easily proved. It was argued by Mr. *Boteler*, when the present question was under discussion before *Wigram*, V. C., that a construction which should confine the operation of the act to cases where a legal capacity of exemption was shewn aliundè, would in a great measure render it nugatory (*a*). The plaintiff relies upon the title and preamble of the act, which are for *shortening* the time: but these

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(*a*) 1 Hare, 199.

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agree with the provisions of the act, and no inconsistency arises between them, from the construction which the defendants seek to put upon it. The act removes the necessity of proving a legal origin in case of total exemption. It makes the whole matter, in absence of everything else but enjoyment, a mere question of time. It is admitted that no doubt arises upon the enacting part of the 1st section. If the question rested there, it is agreed that there would be no room for any doubt whatever, and that then non-payment would be conclusive evidence of a claim of total exemption. At all events, it is *prima facie* evidence, and throws the burthen of proof on the opposite side. The preamble certainly casts a doubt upon the question, by the words "by *shortening* the time," which are there introduced. It has been said that there is no such thing as a particular exemption from tithes; but it is laid down, in *Eagle on Tithes* (a), that "a prescription may be alleged for a part as well as the whole of the tithes of the land:" *The Parson of Peykirke's case* (b), *Clavill v. Oram* (c), *Thorpe v. Mattingley* (d). Then, with respect to the 7th section. It is only necessary for the landowner to allege that he has enjoyed such exemption; he need not allege or prove the grounds of that exemption. In this respect, Lord *Tenterden's* other act, 2 & 3 Will. 4, c. 71, may be referred to as being analogous to the present: there the time of enjoyment is the evidence of the right. [*Parke, B.*—Is the claim of exemption *ratione ordinis*, when established under this act by proof of non-payment, a general and absolute exemption, or a qualified one, so long as the lands continued in the hands of the claimant?] An absolute exemption, or at all events it would be so *prima facie*, under the 7th section; the tithe-owner might reply, and shew how such exemption had been removed. If the statute has not effected this, it is nugatory. It was evidently intended for

(a) Vol. 2, p. 230.

(b) 1 E. & Y. 66.

(c) 3 E. & Y. 1369.

(d) 2 Y. & C. 421.

the benefit of the claimant for total exemption. The policy of the law is to establish the rights of property and enjoyment; and the present question does not turn so much upon the narrow construction of an act of Parliament, as upon the rule of policy already mentioned. With respect to the construction of a statute, the case of *Doe d. Bywater v. Brandling* (a) is an authority to shew, that where there is no repugnancy between the preamble and enacting part, the defendants' construction of the act, which gives to the enacting part its largest remedial operation, should be adopted. And this construction is consistent with the general tone of modern legislation. It has been urged that a legal, that is, lawful, origin must be shewn. But, if a person remain in enjoyment of another's land for a certain period, although at first he may unlawfully obtain possession, he thereby may acquire a good and lawful title. Why should not this rule be extended to the case of exemption from tithes? With regard to the second proposition, if the first be established in the defendants' favour, great progress will be made towards establishing the second; and it is submitted that, in the decision of this part of the question, a liberal and broad construction should be placed upon the statute, so as to extend its operation and the benefits it is meant to afford.

Manisty, in reply.—Upon the construction which has been contended for by the defendants, the Church would be deprived of some of her rights. If this statute had been intended to give an exemption from tithes in the manner proposed, the legislature would have framed it differently, and would no doubt have inserted a specific clause to effect that object.

Cur. adv. vult.

The judgment of the Court was now delivered by

(a) 7 B. & C. 600.

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POLLOCK, C. B.—The case which has been sent for our opinion from the Court of Chancery, was amended in consequence of some observations of the Court, and raises now two questions.

First, whether under the statute 2 & 3 Will. 4, c. 100, a valid and indefeasible prescription or claim of exemption from, or discharge of, tithes can be sustained for certain lands, which have never paid tithe of any kind, or anything in lieu thereof, for the statutory period of two incumbencies and three years of a third, making together not less than sixty years; though during such period titheable matters and things, (the tithes whereof are demanded by the bill), and other titheable matters, grew and arose at various times.

Secondly, whether a valid and indefeasible prescription or claim of exemption from, or discharge of, the tithe of a particular titheable matter, can be sustained under that statute, where no tithe of such matter, or anything in lieu thereof, has been paid for the statutory period, although at various times during that period such titheable matters have been grown on particular lands, and the tithes of all other titheable matters grown on the said lands have been, during that period, from time to time rendered. In other words, the first question is, whether there is a total exemption of certain lands bearing titheable matters, simply because no tithes whatever have been paid in respect of them for the prescribed period—the second question, whether, if some tithes have been paid and others not, there is an exemption for the latter.

These questions depend upon the construction of the act of Parliament, which, unfortunately, has been so penned as to give rise to a very remarkable difference of opinion amongst the judges; and it must be admitted that the act has not been drawn with the accuracy that was to be expected from the very eminent judge to whom the preparation of it is, and we believe correctly, attributed. After that great difference of opinion, it is impossible not to feel a doubt as to the propriety of the conclusion to which we

have come: that conclusion is, that the first of these questions is to be answered in the affirmative, but with a qualification, viz. *that the enjoyment has been as of right*; the latter simply in the negative.

We propose to construe the act of Parliament, according to the legal rules for the interpretation of statutes, principally by the words of the statute itself, which we are to read in their ordinary sense, and only modify or alter so far as it may be necessary to avoid some manifest absurdity or incongruity, but no further. It is proper also to consider the state of the law which it proposes or purports to alter, the mischiefs which existed, and which it was intended to remedy, and the nature of the remedy provided, and to look at the statutes in *pari materiâ* as a means of explaining this statute. These are the proper modes of ascertaining the intention of the legislature; and we shall not, therefore, refer to the Report of the Real Property Commissioners, published shortly before the passing of this act, and to which it is supposed to have owed its origin, in order to explain its meaning; not conceiving that we can legitimately do so, however strongly we may believe that it was introduced in order to carry into effect their recommendation to establish a new statute of limitations for tithes.

Before we proceed to examine the words of the statute itself, it will be convenient to consider the state of the law at the time, which the act was intended to alter. The law of tithes was anomalous. In the first place, the legislature had protected the property of the Church by rendering it inalienable. That which other proprietors in fee-simple could do with their property, the Church (represented by the incumbent, patron, and ordinary) was disabled from doing. Again, the nature of the property was itself peculiar. A layman could not at common law have any permanent estate in tithes, for they were spiritual, as it was said; and, consequently, not being capable of having such permanent estate in them, he could not claim to be

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discharged of them. But the same rule did not apply to ecclesiastical persons, nor to the king, who was *persona mixta*, nor to their respective farmers, lessees, and tenants. These rules had produced a somewhat strange state of law, which was still further complicated by the statutory arrangements consequent on the dissolution of the monasteries, by which laymen, possessors of abbey lands, became entitled to the privileges and exemptions of the ecclesiastical bodies from whom their property was derived. The various defences (under these circumstances) to the claim of payment of tithe in kind may be thus stated: first, *modus decimandi*, which was either a custom time out of mind within a district, of paying tithes in one constant mode, fixed by the custom, and depending on some antecedent agreement made before legal memory between the parishioners and the parson, patron and ordinary, for giving to the parson some definite profit in lieu of tithes, or by prescription in the case of individual lands, founded on a like agreement; secondly, discharge by composition real, which scarcely differed from a *modus* in any other respect than by having its commencement after legal memory, and before the disabling statute 13 Eliz., and in being founded on a deed or writing; but the thing given by the parishioner, and received by the parson, in lieu of tithes, was often precisely the same as that which was the substitute for the tithe in the case of a *modus*. Subsequently, also, to the disabling statute of Elizabeth, a species of composition real was attempted to be created by a deed of composition, to which parson, patron, and ordinary gave their consent, and which, after an amicable suit, was confirmed by decree of the Court of Chancery. But these supposed compositions real, after existing for some time, were declared illegal by Lord *Northington*, in the case of *The Attorney-General v. Cholmondeley* (a), in the year 1765, and his decree was confirmed by the House

(a) 2 Eden, 304.

of Lords. From that date these supposed compositions real ceased, and such arrangements had subsequently been confirmed by private acts of Parliament alone.

There remain only the other heads of exemption, which all depended on the nature of the lands sought to be discharged: first, those lands which from time immemorial had been, and were held free of tithes in the hands of ecclesiastical persons, their leasees, farmers, or tenants; secondly, those which had been so held till the dissolution of monasteries, and were in lay hands by grants from the Crown; and lastly, those which, at the time of such dissolution, had been in the hands of the two privileged orders of Cistercians and Hospitallers, and had been granted in like manner to laymen by the Crown. In the proof of these various grounds for non-payment of tithes in kind, certain difficulties had arisen. In the case of moduses, inasmuch as it was necessary to shew a payment of the same modus from the time of Richard I, it is obvious that a variation at any remote period short of that date was fatal; and it often happened that, by the production of ancient documents, such as the taxation of Pope Nicholas, the ecclesiastical and parliamentary surveys, ancient terriers, and the like, moduses which had confessedly been paid for one hundred or two hundred years without variation were set aside, and this after property had been transferred on the supposition of their validity; so that it was justly said, that the law in this respect was anomalous, for that whereas length of time in all other cases established rights, in the case of the Church it was of itself absolutely immaterial to the title of the laity to exemption. But, besides the insecurity of the title, the expense to the parties in such suits was enormously increased by the existing state of the law.

The cases of composition real were but slightly different. Practically they were liable to the same danger as moduses, from variations of payment or the like; but besides this, the Courts had held that mere usage alone was not sufficient, for *that* (as it was said) would be to convert often a *bad mo-*

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dus into a *good composition real*; for a *modus rank* in the time of Richard I, and therefore bad, might not be rank in the 13 Eliz., and so might be valid as a *composition real* of that date. The Courts, therefore, required some proof of the instrument of composition. But the strictness of the rule on the subject of this proof had been much relaxed, and very slight evidence of such deed, and even reputation alone, accompanying the fact of payment, tending to shew that such payment was in respect of a *composition real* existing after legal memory and before the 13th of Elizabeth, seems to have been sufficient to lead to the presumption that such payment was evidence of *composition real*, and not of a *prescriptive modus*. But, undoubtedly, notwithstanding the learned argument of Mr. Baron *Wood*, in *Bennet v. Neal*(a), some evidence was required in addition to the fact of mere payment of the same sum continually. The case of a *composition real*, therefore, seems to have been subject to the same difficulties (with, however, this slight addition to them) as that of the *modus*.

We now come to the cases of exemptions. In some of these much greater inconvenience was experienced, and more expense was generally incurred in their proof. Those, indeed, which depended on prescriptions, set up by ecclesiastical corporations, their lessees or farmers, were liable to the same inconveniences as have been already pointed out in the cases of *moduses* and *compositions real*; but those in which the exemption was claimed by virtue of the privileges enjoyed by abbeys at the dissolution, required much time and very expensive proof. They required proof, in the case of *prescriptive exemptions*, that the abbey was itself *immemorial*, that its possession of the lands should be shewn to have been *immemorial* also, and that this possession should be shewn to have continued to the time of the dissolution. In the case of exemption by order, the monas-

(a) Wightw. 324.

tery must have been shewn to have been Cistercian or Hospitaller, the lands to have belonged to it at the Council of Lateran, and at the dissolution. It is not necessary to refer to discharges by composition or grant to ecclesiastical bodies, or to that by unity of possession, as they were scarcely ever set up in practice.

But, though all these proofs were by degrees made more and more general, by the enlarged effect which the more modern decisions gave to the usage, which was held to be a ground of presumption of all which was necessary to sustain the exemption, after the proof of title to the abbey lands or composition real was given, yet the risk and expense of a tithe suit to the parties was still very great. In this state of the law, the act of 2 & 3 Will. 4, c. 100, passed, and was undoubtedly intended to provide a remedy for some of these mischiefs, and must be construed according to the established rule, in a liberal spirit, for the purpose of furthering that remedy, and repressing the mischief.

What, then, was the mischief which the legislature meant to remove, and what the remedy intended to be applied? For the plaintiff it is argued, that, in the case of a modus, it was intended only to shorten the time during which it has been paid, without altering the law as to the other qualities which a modus ought to possess; and that proposition is not, we believe, disputed by the defendant. A modus, therefore, good in other respects, is valid, if paid for the statutory period. Rankness (which always was, in truth, merely evidence against the presumption of immemorial payment) becomes no longer an objection.

A composition, therefore, made in modern times, if acted upon for the full statutory period, becomes a valid modus, unless, indeed, it shall be proved that it was made by some consent or agreement by deed or writing.

But with respect to the clause as to exemption, the litigant parties altogether differ; the plaintiff contending that the only object of the statute was to make a new enactment

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as to time, when used as evidence in support of an acknowledged known legal right of exemption, on the ground of composition real, or the land being abbey lands, leaving all other facts necessary to support such exemption to be proved as heretofore: the defendants, on the other hand, insisting that much more was intended, and that the object was to make the simple non-payment of tithes for the prescribed statutory period a valid exemption; in other words, to give to the laity a right to prescribe in non decimando, and to render the time of that prescription shorter than by the common law would have been required, if such a prescription had been valid. But, before construing the words of the act, if we consider which of the two objects is the more probable, it seems to us that little, indeed, no good is done by the act, if the plaintiff's construction is correct. According to the old law, a non-payment for much less than the prescribed period, particularly when that period is sixty years, would have been sufficient to raise the inference of all that was necessary to make the claim of exemption valid, the preliminary evidence of a composition real, or title to abbey lands, having been first given: and, although it is true that the statute would have protected an usage for the longer period, in such a case, from being destroyed by proof of payment of tithe in kind, and so far would be an advantage, yet, in those cases where there must be some evidence of compensation real or title to abbey lands, the chance of the modern usage being defeated by the circumstance of the payment of tithe in kind, or the proof of a modern agreement for a composition, would be trifling; indeed, it may be said to be almost imaginary. What the statute, therefore, effects on the plaintiff's hypothesis is nothing. In reality it requires a longer period of non-payment, for by section 8, nothing less than the statutory time will avail, and it protects from a mere imaginary danger. This would not be so on the defendants' supposition, for then a real benefit will be conferred on the tithe-payer.

We proceed, then, to the words of the statute itself; and

we conceive that the best course is, to consider first the words of the enacting clause, before we refer to the context, which, no doubt, may restrain or control them. The words of the enacting part, without the context, appear to us to be clear enough, and open to no reasonable doubt. Those of the 1st section, which are applicable to exemptions, are these :—" All prescriptions and claims of or to any exemption from or discharge of tithes, by composition real or otherwise, shall, in cases where the render of tithes in kind shall be hereafter demanded by the king, &c., or by any lay person, not being a corporation sole, or by any body corporate, if many, whether temporal or spiritual, be sustained and be deemed good and valid in law, in cases of claim to exemption or discharge, by shewing the enjoyment of the land, without payment or render of tithes, money or other matter in lieu thereof, for the full period of thirty years next before the time of such demand, unless, in cases of claim to exemption or discharge, the render or payment of tithes, or of money or other matter in lieu thereof, shall be shewn to have taken place at some time prior to such thirty years, or it shall be proved that such enjoyment was had by some consent or agreement expressly made or given for that purpose by deed or writing; and if such proof in support of the claim shall be extended to the full period of sixty years next before the time of such demand, in such cases the claim shall be deemed absolute and indefeasible, unless it shall be proved that such enjoyment was had by some consent or agreement expressly made or given for that purpose by deed or writing." In all these cases, nothing is required but *the enjoyment of the land* without the payment of tithe, or an equivalent for tithe, for the required time. The statute then proceeds to enact, that " where the render of tithes in kind shall be demanded by any archbishop, bishop, parson, &c., or other corporation sole, whether spiritual or temporal, then *every* such *prescription* or claim shall be *valid and indefeasible*, upon evidence

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shewing *such* enjoyment had as hereinbefore mentioned, applicable to the nature of the claim, for and during the whole time that two persons in succession shall have held the office or benefice in respect whereof such render of tithes in kind shall be claimed, and for not less than three years after the appointment and institution *or* induction (an inaccuracy or misprint; it ought to be, 'or institution *and* induction') of a third person thereto," with a provision, in case the whole time of the holding of two persons shall be less than sixty years, that the time should be continued for that period, including three years after the institution and induction of a successor—a time which, in the present case, was completed. Now we think that it is perfectly clear that a claim to a modus or exemption, or any other thing, cannot be sustained and be deemed *good and valid* in law, and indefeasible, by *evidence of anything less than that which shews a complete title to the thing demanded*. Therefore, when the act says the claim shall be sustained and deemed good and valid in law, and indefeasible, by evidence shewing the non-payment of tithes for sixty years, it follows that the legislature intended that non-payment for that period, without more, should constitute a complete title.

But then it is said, that the commencement of the clause shews that the framer of the act meant that there should be no claim, except on the ground of composition real, or other *then known existing ground of discharge*; and that every claim, notwithstanding the act, must still be pleaded as arising by composition real, or some such other legal ground, and that, if pleaded, must be proved. We cannot concur in that view of the meaning of these expressions. The 2nd section contains a clause, the interpretation of which is doubtful, and which it will be well to consider in this place. It provides, that "no modus, exemption, or discharge shall be deemed to be within the provision of that act, unless proved to have existed and been acted upon at the time of, or *within one year* next before, the passing of this act."

What is the meaning of this clause? It may mean to confine the benefit of the act to claims of exemption theretofore made, not necessarily to such claims completed by enjoyment for the whole period, but to claims which had begun to be and were acted upon at or within one year before the act, and to exclude all future moduses and all future exemptions; or it may mean to exclude from the act such former claims as had not been acted upon within that period, that is, *former* claims which have been abandoned, leaving all unabandoned claims, and all claims hereafter to arise, to be within its operation. The former construction follows the literal sense of the words; the latter requires a slight modification of the language, to be read as if the words had been, "no modus or exemption, *heretofore claimed*, shall be within the act, unless it has existed and been acted upon at the time required;" or, "no modus or exemption shall be within the act, if it shall have ceased *to exist and be acted upon* for a year." One cannot help supposing the intention of the legislature in this clause was simply to prevent abandoned claims, though they had been acted upon for sixty years before, being again set up; but it is immaterial, for our present purpose, to decide which of the two constructions is the right one, and it has become immaterial for every purpose since the Tithe Commutation Act. If we assume the literal construction to be correct, and that existing claims to exemption only are within the act, then the construction of the first clause is clear enough. All existing claims must have been made on the ground, real or supposed, of a composition real, or other known legal ground of exemption; and the meaning of the first clause is only this, that every such claim to exemption shall now be rendered valid by evidence of non-payment of tithe only; so that the difficulty of proving the fact of an ancient composition before the 13 Eliz. or the title to abbey lands, is altogether put an end to. If we adopt the latter construction, and hold the statute to embrace all exemptions, past and future (except

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those which have been abandoned), then the clause may be taken to mean, that any claim to exemption, on whatever ground it may be made, shall be rendered valid and indefeasible by evidence of enjoyment merely. That is to be the only proof. Will it be necessary, then, to plead a ground of exemption legal according to the old law? We think not. It will be enough to plead the statutory title, and we think that the 7th section was framed for that purpose, by permitting a new form of pleading. We say "permitting," for we do not suppose that it was meant to interfere with the statutable right of pleading *nil debet* in these cases, and probably it was intended to be applicable only to pleadings in equity. It is provided, that "it shall be sufficient to allege that the modus, exemption, or discharge claimed was actually exercised" (words inappropriate, as applied to a modus, exemption, or discharge) "and enjoyed for the period prescribed." It would be, therefore, sufficient to allege, if a special plea were required, that the defendant had exercised or enjoyed a modus, (describing it), or a total and absolute exemption, or a qualified exemption, from all tithes of certain particular lands (as the case might require), for the statutory period applicable to the case; and we do not think that it was intended that there should be any allegation that there was a composition real, or that the lands were abbey lands, as would have been previously necessary in a special plea of exemption. We are of opinion, therefore, that the enacting clause, taken altogether, is sufficiently clear to create a valid title to exemption from tithe as to particular lands, upon proof of such enjoyment without paying tithes, and no more, always understanding that such enjoyment is *as of right*.

The remaining question is, whether it is controlled by the context; and, for this purpose, the preamble and the 2nd section are both relied upon, particularly the former. The title of the act has also been mentioned; but although

it has occasionally been referred to as aiding in the construction of an act, (particularly by Sir *John Nicholl*, in *Brett v. Brett* (a)), it is certainly no part of the law, and, in strictness, ought not to be taken into consideration at all: Lord *Coke*, *Powlter's case* (b); Lord *Holt*, *Wells and Wilkins* (c); Lord *Mansfield*, *Rex v. Williams* (d); and Lord *Hardwicke*, *The Attorney-General v. Lord Weymouth* (e). But the preamble is undoubtedly a part of the act, and may be used to explain it, and is, as Lord *Coke* says (f), "a key to open the meaning of the makers of the act, and the mischiefs it was intended to remedy;" but, on the other hand, although it may explain, it cannot control the enacting part, which may, and often does, go beyond the preamble. It is on this preamble that the chief reliance is placed, as shewing that the statute meant to do nothing but shorten the time necessary to establish a modus or exemption, leaving everything else as before. We do not consider the preamble as very happily expressed; but we cannot think it in any way at variance with the enacting clause, as we construe it; for the mischief there recited does not seem to us to be the augmented expense of suits, arising from the necessity, according to the existing law, of proving the payment of modus or non-payment of tithes for long periods of time. We do not agree in the view taken of this subject in the able and elaborate judgment of the Vice-Chancellor *Wigram* (g), as it seems to us that a very reasonable construction can be put on it, quite in harmony with the enacting clause. The preamble recites, that the expense and inconvenience of suits, instituted for the recovery of tithes, ought to be prevented; and by that we understand, not that the expense of suits (the number of which is supposed to remain as before), and the inconvenience of conducting them, might and ought to be prevented, but that expensive and incon-

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(a) 3 Addams, 210.

(b) 11 Co. 33.

(c) 6 Mod. 62.

(d) 1 Wm. Bla. 95.

(e) Amb. 22.

(f) 4 Inst. 330.

(g) 1 Hare, 196.

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venient suits ought to and might be prevented, and that by the enacting a more easy method of establishing both moduses and exemptions, by shortening the time required for proof of both, which, by the old law, must have extended, in the case of modus to the time of Richard I, and in that of exemption in respect of abbey lands, in most instances to the time of legal memory, and in none to less than the 31 Hen. 8, and in the case of composition real at least to the 13 Eliz. An easier mode of proving a title to exemption, by limiting the inquiry to the period of thirty years or sixty (as the case might require), would prevent many of those nice questions, and much of that expensive litigation, which prevailed before, to the detriment of both the parties concerned. We think, therefore, that the preamble may well be reconciled with the enacting part; and, if it were less reconcileable, the enacting part is so clear and distinct, that it ought not to be controlled by it.

Some reliance, but less, is placed on the 2nd section, which provides, that every composition for tithes which had been made or confirmed by the decree of any court of equity in a suit, to which the ordinary, patron, and incumbent were parties, and which had not been set aside, abandoned, or departed from, is made valid in law. It is said, and it is true, that no such decrees have been made since 1765, as has been before stated, and consequently none, probably, within the statutory period; and therefore, that the clause was unnecessary, if the legislature meant to create a new right of discharge by non-payment for the statutory time. But that a clause is unnecessary, affords only a weak argument with respect to modern statutes; and it may be that the framer of the act did not bear in mind this matter of legal history, or, if he did, that he wished to give the benefit of the clause, in case any such decrees might happen to have been made within the prescribed period. The argument, therefore, arising from this clause is, at the best, entitled to very little attention. But it may be, and indeed in almost all cases it was so, that the decree was founded on an

agreement made by deed or writing, and then the tithe-payer might not have been protected at all by the general enactment of the first section, and the clause would in that case be absolutely necessary to protect him.

On the whole, therefore, so far as we have considered the provisions of the act, we think that the intention of the legislature was to give a right to the laity to a species of prescription in non decimando, and to establish that right by proof of the prescription for the specified period. We say "by proof of the prescription," because it is perfectly clear to us that the simple enjoyment of land without payment of tithe could never have been intended to confer a right. The literal construction of the enacting clause would lead to manifest injustice, and for the sake of avoiding that injustice the language must be in some respects modified. It is impossible to suppose that the legislature meant the titheowner to be deprived of his right, unless, having had an opportunity of enforcing it, he had abstained from so doing for the statutory period. It is *acquiescence* in the *adverse* enjoyment of the exemption that is intended to make it valid and indefeasible: and this is rendered, as we think, quite clear, from the legislature requiring the continued acquiescence of three successive incumbents, although the period might exceed sixty years. Hence, if we suppose a case of an occupier of land, the whole of which had for the prescribed period lain in a barren state, not producing titheable matters,—a waste, for instance, a pleasure-ground, a space covered with gross bois, or with buildings, the bed of a lake or a marsh,—it cannot be supposed that the legislature intended that it should be held for the future tithe free, when the land by a subsequent alteration became productive of titheable matters. The act, therefore, must be obviously read with the qualification that there has been an enjoyment of land *producing titheable matters* during the prescribed period. But further, to bring the case within the meaning of the act, the mere enjoyment without paying tithe, when titheable matters are produced, cannot be sufficient. If the occupier of land

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producing titheable matter had omitted to set out or pay tithe, or concealed or abstracted it during the whole period, or taken it from time to time by the consent of the tithe-owner; if he had enjoyed the exemption *claus aut precario*, no right could be conferred. It must be *an enjoyment as of right*; and we must construe this act in the same way as the 2 & 3 Will. 4, c. 71, which the Courts have in many cases, beginning with *Bright v. Walker* (a), uniformly construed to mean, that the enjoyment of the profit or benefit contemplated by that act must be an enjoyment as of right. Again, the occupier of lands exempt *ratione ordinis dum propriis manibus excoluntur*, being himself the owner, never pays tithe, though titheable matters are produced; and so the tenant of crown lands is exempt by prescription. In such a case, are we to say that the non-payment of tithes, though titheable matters have been produced during the whole period of limitation, is to make the claim to exemption valid and indefeasible? It must be held that it could never have been the intention of the legislature to convert the qualified into an absolute right of exemption, and deprive the tithe-owner of his rights, by a presumed acquiescence for a period during which he could never have insisted upon the payment of any tithe whatever. This difficulty may be readily obviated, by holding that, as the statute applies only to those cases in which the enjoyment has been adverse and of right, the nature of the enjoyment would qualify the right of exemption. If it had taken place under a claim of absolute unqualified right, it would be absolute; if qualified, it would be qualified, so that neither the crown, nor a person claiming exemption *ratione ordinis*, could set up a non-payment for the prescribed period as giving an absolute right of exemption. Upon the whole, therefore, the result of our consideration of the statute is, that whilst, on the one hand, we reject the limited construction which the late Lord Chief Justice *Tindal* and my Brothers *Patteson*, *Coleridge*,

(a) 1 C. M. & R. 219.

and *Cresswell* have put upon it, which would make the statute practically inoperative as to the remedy of expense and inconvenience; on the other hand, for the reasons above assigned, we must reject the literal construction of the words, and hold that the enjoyment for the period prescribed, without the payment of tithes, or a temporary composition for them, is converted into a title to be discharged of tithes, only where it is an enjoyment adverse and *of right*; and the title so communicated is absolute or qualified, according to the nature of the enjoyment. And this construction is in harmony with that of Lord *Tenderden's* prescription act, and, indeed, with the whole course of recent legislation, in which the object has been to give a valid title to quiet possession, and to convert the long undisputed exercise of rights into actual rights: thus putting an end to the distinction which existed between tithes and other property, and placing them on the same footing as other property; and this view accords in the main with that taken by Lord *Denmun*, my Brother the late Mr. Justice *Williams*, and my Brothers *Coltman* and *Erle*, as to the principal question, though we have thought it necessary to express ourselves fully as to what we consider the necessary qualification of their construction of the words of the statute. It cannot be denied that this construction gives validity to claims which could not otherwise have been maintained, and is an injury, therefore, to the rights and a diminution of the property of the Church. But, on the other hand, there is a great public benefit by giving security to long possession. It is on this principle that all statutes of limitation proceed, though doubtless at the expense of some individual mischief. But the balance of justice and convenience, as my Brother *Coltman* observes, is found to be the other way; and, on the whole, it is most for the general interests of society that possession and enjoyment for a length of time should be looked to as the safest evidence of men's rights.

The second question is a very different one. It is whether

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the enjoyment of the land without payment of tithe of a particular titheable matter for the prescribed period (all other tithe having been paid during that time) gives a valid and indefeasible right of exemption from the payment of that species of tithe. Now this case is clearly not within the words of that act. If a modus is paid for that period for that particular tithe, it is no doubt rendered a valid modus by the operation of the statute, but if no modus has been paid the case is not provided for. It is only where *land* has been enjoyed without payment of any tithes, or of money or other matter in lieu thereof, that the statute applies; and there appears to us to be no reason why we should alter the language of the statute in order to include such a case. How often during the sixty years, or other prescribed period, must the particular article have been grown in order that the non-payment of the tithe of it may create an exemption? If during that period a new vegetable has (occasionally, but rarely) been grown, and the titheowner has omitted to require the tithe of it, is the vegetable hereafter to be cultivated to an unlimited extent, and no tithe to be paid? This would be obviously unjust, and therefore we hold that the statute applies only to the cases within the express words of it. Though there is great reason for providing, that, where a particular estate which must in the ordinary course have produced every year some titheable matters, and the titheowner has never claimed them, the estate should be exempt, there is by no means the same reason for holding, that, where it has sometimes produced a particular species of titheable matter, (and that tithe of it has not been paid), the land should be exempt from that species of tithe. We see no reason, therefore, for departing from the words of the act, and we answer the second question in the negative.

The following certificate was afterwards sent to the Lord Chancellor:—

“This case has been argued before us by counsel, and we

have considered it, and, the alterations made therein (by consent) having made it necessary to divide the question into two parts, we certify to your Lordship our opinion on each part as follows:—

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“First, we are of opinion, that, as to those parts of the lands in question whereof no tithe of any kind, nor any money or other matter in lieu thereof, has or have been paid or rendered during the period above mentioned, according to the true construction of the said statute, a valid and indefeasible prescription or claim of exemption from, or discharge of, all tithes can be sustained under the circumstances hereinbefore mentioned, provided all the tithes of all the titheable matters from time to time growing on the said parts of the said lands, be shewn to have been, during the whole of the said period, withheld adversely and under a claim as of right acquiesced in by the titheowner.

“Secondly, as to the other parts of the lands in question whereof no tithe of the particular titheable matters and things, the tithes whereof are demanded by the plaintiff’s bill, nor any money or other matter in lieu thereof has or have been paid or rendered during the period above mentioned, although at various times during such periods such titheable matters and things grew and arose upon such last-mentioned lands, other titheable matters and things having also at various times during the said periods, including corn, grain, and hay, grown and arisen thereon, and the tithes of all such last-mentioned titheable matters and things having been from time to time duly paid and rendered, we are of opinion, that no valid and indefeasible prescription or claim of exemption from, or discharge of, the tithes demanded by the plaintiff’s bill can be sustained under the circumstances above stated, according to the true construction of the said statute.

“FRED. POLLOCK.	E. H. ALDERSON.
“J. PARKE.	T. J. PLATT.”

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May 16.

DUKE and Others v. ANDREWS.

A., by letter, requested the committee of a Railway Company to allot him a certain number of shares in the undertaking, and thereby undertook to receive the same, or any less number, and to pay the deposit and execute the parliamentary contract and agreement when required. In answer to this application, he received a letter from the Company allotting him certain shares. This letter was headed, "*Not transferable*:"—*Held*, that this term qualified the acceptance, and that the two letters did not together constitute any contract; and, therefore, in an action by the Company against A., to recover the deposit, that they were not entitled to recover.

ASSUMPSIT.—The declaration was framed upon a special contract between the plaintiffs, the committee of management of the Dorking Brighton and Arundel Railway Company, and the defendant, as an allottee of sixty shares in the said Company; and stated that, in consideration of the plaintiffs allotting the shares to the defendant, he promised to pay the deposit; and laid by way of breach the non-payment of the deposit. The defendant pleaded non assumpsit, and several other pleas. The cause came on for trial at the London sittings after Trinity Term, 1847, before the Lord Chief Baron, when a verdict was taken by consent for the plaintiffs, with £126 damages, subject to the opinion of this Court upon a case, the following portion of which is alone material.

The Company was projected in the summer of 1845, and the plaintiffs were appointed the managing committee. On the 10th of October in the same year, the plaintiffs, as such committee of management, caused to be printed and issued to the public a prospectus of the Company. This prospectus, after stating the name of the projected railway, the proposed capital, and the amount of the shares and deposit, and the provisional registration, set out the names of the provisional committee, and also those of the managing committee, which were those of the plaintiffs. After giving the names of the engineers, and of the other officers of the Company, and after stating the advantages and expectations of the projected line, it proceeded to announce, that, until an act of Parliament was obtained, the affairs of the Company would be under the control of the committee of management, to whom power was given to allot the shares, and to apply the funds of the Company in payment of all the expenses incurred in its formation and in the preparations for Parliament; it also stated, that, in order to comply with the

standing orders of Parliament, and to meet the preliminary expenses, a deposit of 2*l.* 2*s.* per share must be made on allotment, and that application for shares was to be made in the form subjoined to the prospectus. One of these prospectuses having come to the hands of the defendant, who was then in trade as a silk and ribbon agent, in the city of London, he tore off the printed form of application from the foot of the prospectus, filled it up and signed it with his name, and sent it to the secretary of the Company on the 10th of October, 1845, and it was received by them the same day.

The following is a copy of this letter of application, so filled up and signed :—

“ Form of Application for Shares.

“ To the Committee of the Dorking, Brighton, and Arundel Atmospheric Railway, by Horsham and Shoreham.

“ I request you to allot me one hundred shares, of £20 each, in the above undertaking ; and I hereby undertake to accept the same, or any less number which may be allotted to me, and to pay the deposit thereon, and to execute the parliamentary contract and agreement when required. Dated the 10th of October, 1845.

“ Name, in full . . . JOHN HOLMAN ANDREWS.

“ Residence . . . 27, West-street, Lambeth.

“ Business or profession { Silk and ribbon agent,
(if any) . . . { 26 and 27, Addle-street,
City.

“ Reference . . . { W. H. Hughes, Esq.
J. Buckland, Esq., 84,
Watling-street.”

The committee of management allotted a great number of shares, by issuing letters of allotment to the different applicants for shares ; amongst these letters was one to the defendant, which was in the following form, and was signed

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by the secretary of the Company, and addressed to the defendant:—

“ Not transferable.

25.

“ The Dorking, Brighton, and Arundel Atmospheric
 Railway.

“ No. 23.

“ Shares, 60.

“ Deposit, £126.

“ Offices, Adelaide Hotel, London Bridge,
 November 25, 1845.

“ Sir,—The committee having, upon your undertaking, agreed to allot to you sixty shares of £20 in this railway, I have to request that you will pay the deposit of 2*l.* 2*s.* per share, amounting to £126, to the account of the Company with either of the under-mentioned banks, on or before the 9th day of December, 1845.

“ *This letter must be produced at the time of payment*, and the bankers' receipt will afterwards be exchanged for the scrip certificates, upon your executing the parliamentary contract and subscribers' agreement, which will lie for signature, at this office, on and after Friday, the 21st day of November instant; and, for the convenience of persons residing in the country, at such other places and times as will be announced by advertisement in the local newspapers.

“ I am, &c.,

“ Secretary pro tem.

“ Mr. John Holman Andrews,
 27, West-street, Lambeth.

[Here follow the names of the bankers.]

“ N.B.—The parliamentary contract and subscribers' agreement must be executed by you before the 15th day of December, 1845.

“ Bankers' Receipt.

“ No.

“ November, 1845.

“ Received on account of the committee of management of

the Dorking, Brighton, and Arundel Atmospheric Railway Company, to account for on demand, £ . . .
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“In order to prevent mistakes or error, the subscriber will be pleased to fill in the following blanks, in his own handwriting, at the time he obtains this receipt:—

- “Name of subscriber, in full.
- “Place of business (if any).
- “Place of residence.
- “Profession or trade.
- “Subscriber’s usual signature.”

The other letters of allotment were in a similar form.

Together with the letters of allotment, the committee of management also sent to the defendant and the other allottees a circular letter, of which the following is a copy:—

“Adelaide Hotel, 25th November, 1845.

“Sir,—In transmitting to you a letter of allotment of shares in this Company, I am desired to inform you that the committee of management have forborne to issue the same until they should have the gratification of being able to announce, that not only the shares of the managing directors and the provisional committee of this important undertaking had been duly taken up and the deposit paid to the bankers of the Company, but that the plans, sections, reference books, and every other requisite document, were in a perfect state for deposit, in conformity with the standing orders of both Houses of Parliament, and which, the committee have now great satisfaction in being able to state, is in every respect the case. It is also gratifying to the committee to state, that the deposits upon upwards of 5000 shares, so taken, have been promptly paid to the bankers of the Company, and that they feel assured the deposit upon a still greater number of shares, which have been allotted to their immediate friends, will be paid with similar promptitude, upon receipt of their letters of allotment. It cannot

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be otherwise than satisfactory for the shareholders to know that the most eminent engineers are decidedly of opinion that this route embraces, more than any other, the natural advantages of the country, as well as to find that it meets with the general concurrence and active support of the principal landowners of the district. The committee feel it due to themselves to state that they were so satisfied of the utility and prospective advantages of the measure, that they did not hesitate to encounter the engagements essential to the bringing the plan to its present state of maturity, and to defer any call upon the shareholders until they were in a condition to make this gratifying announcement. The committee engage that a greater expense than 7*s.* 6*d.* per share shall not be incurred without the sanction of the shareholders, expressed at a meeting to be convened for that purpose.

"I am, &c.,

"Secretary pro tem."

The above letter of allotment and circular were received and kept by the defendant, but no notice was taken of them, or deposit paid by him. Application for payment was subsequently made to him and other allottees by a circular letter. Notwithstanding this letter, however, the committee were unable to obtain payment of the deposits from the defendant, or the other allottees, and consequently were unable to make the deposits required by the standing orders of Parliament, in order to carry the scheme before Parliament. The project was, however, kept on foot during 1846, in hopes of going to Parliament in the session of 1847; and, although not formally abandoned by the managing committee at the time of the commencement of this action, no steps were taken to procure the requisite acts of Parliament.

It was agreed between the parties, that the Court, if it should think proper, might draw the same inferences as a jury might draw from any of the facts stated in the case.

The question for the opinion of the Court was, whether the plaintiffs, under the circumstances stated in the case, were entitled to recover in this action against the defendant.

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If the Court should be of opinion in the affirmative, then the verdict was to be entered for the plaintiffs, with £126 damages; but if the Court should be of a contrary opinion, then a nonsuit was to be entered.

J. Brown, for the plaintiffs.—It will be contended, on the part of the defendant, that the shares allotted by the Company were never accepted by him, and therefore that there did not exist any binding contract upon which the defendant became liable. It is admitted to be a general rule, that the letter which is the acceptance of a proposal must accept *the terms* of the proposal, in order to make a valid and complete contract; and that, if a new term be introduced, something in addition is required to confirm the contract: 1 Sugd. Vend. and Purch. 165. The question here turns upon the letters of application and allotment; and the contention will be, that the term "*not transferable*," at the head of the letter of allotment, and the other term, that "this letter must be produced at the time of payment," are new and material stipulations, and that the letter does not amount to an unqualified acceptance of the defendant's proposal. The words "*not transferable*" do not introduce a new term. They were intended as a mere notice of what was thought to be the law in 1845, viz. that the 26th section of the Joint-stock Registration Act, 7 & 8 Vict. c. 110, which prohibits the sale of shares before complete registration in any joint-stock company formed after the 1st of November, 1844, applied to railway companies requiring an act of Parliament; but that was before the case of *Young v. Smith* (a), which decided that the section re-

(a) 15 M. & W. 121.

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ferred to does not apply to such railway companies. This identical objection was raised in the argument of the case of *Wontner v. Shairp* (a), but the Court did not appear to lay much stress upon it. The term is not incorporated into the letter of allotment, and is merely a notice to the defendant. [*Parke, B.*—The defendant, by his letter, applies for such an instrument as he may be able to transfer. If, then, the meaning of the term “not transferable” is such as to deprive him of that right, the application and acceptance are not ad idem, and these letters do not per se constitute any contract.] [He also contended that the words in the letter of allotment, “this letter must be produced at the time of payment,” had been inserted merely for the purpose of convenience, and did not constitute a new term. He cited *Vollans v. Fletcher* (b).]

H. T. Atkinson, for the defendant, was not called upon.

PER CURIAM (c).—We are all of opinion that there must be judgment for the defendant. There was no binding contract between the parties in the present case. The proposal, on the part of the defendant, was for an absolute and unqualified allotment of shares in the Company, but the allotment which was made by the plaintiffs contained the qualification that the shares were not transferable. The condition, that the shares were not transferable, is a matter of great importance to the allottee, for by that term the Company say that they will not recognise his transferee. The proposal and acceptance not being ad idem, it follows that there is no binding contract between the parties; and as that is the case, there is no contract for the breach of which the defendant can be liable. The Court of Common Pleas, in the case of *Wontner v. Shairp*, seem to have en-

(a) 4 C. B. 404.

(b) 1 Exch. 20.

(c) *Parke, B., Alderson, B., Rolfe, B., and Platt, B.*

tertaind the same opinion. The term, which takes away the party's right to transfer the scrip, would make a considerable difference in the value of the property in the market. Our judgment, therefore, must be for the defendant.

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Judgment for the defendant.

BILLING v. HUTCHINS.

April 15.

PETERSDORFF moved for judgment on a plea of nul tiel record. It was an action of debt on a judgment, and the declaration alleged that the plaintiff recovered 19*l.* 9*s.* for debt, and £33 for costs. It appeared by the roll, when produced, that judgment was recovered for 19*l.* 9*s.* debt, 1*s.* damages, 40*s.* costs, and also 33*l.* 19*s.* costs of increase.

Simon, for the defendant, submitted that this was a fatal variance, and not amendable under the 3 & 4 Will. 4, c. 42, s. 3: *Davis v. Dunn* (a).

Petersdorff, for the plaintiff.—There is no variance. The judgment is for three things, which are necessarily divisible, viz. a debt, damages, and costs; and it is only incumbent on the plaintiff to state in his declaration a *debt* corresponding with that mentioned in the judgment. The case differs from that of a judgment for one entire sum, which is misdescribed; as, for instance, a judgment on a bill of exchange for £100, which is described in the declaration as a bill for £95. It is consistent with this declaration that the plaintiff

In debt on a judgment, the declaration alleged that the plaintiff recovered 19*l.* 9*s.* debt, and £33 costs. On plea of nul tiel record, it appeared that the judgment was for 19*l.* 9*s.* debt, 1*s.* damages, 40*s.* costs, and 33*l.* 19*s.* costs of increase:—*Held*, that the defendant was entitled to judgment on the plea, and that there must be a separate application to amend.

(a) 1 Dowl., N. S., 317.

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has abandoned a portion of his claim. [*Parke, B.*—A judgment in *debt* is an entire thing; the costs are added to the amount claimed, and the sum total becomes the debt by virtue of the judgment.] Suppose the damages and costs had been paid, is the defendant to have the benefit of the payment on a plea of *nul tiel record*? [*Pollock, C. B.*—By the judgment, which is the foundation of the present action, the plaintiff recovered 55*l.* 9*s.*; then how can we award judgment for a debt of 52*l.* 9*s.* only?] The Court might give judgment for a smaller, though not for a larger amount. At all events, the variance is amendable under the 9 Geo. 4, c. 15, which enables “every Court of record holding plea in civil actions, any judge sitting at *Nisi Prius*, and any Court of oyer and terminer and general gaol delivery in England, &c., if such Court or judge shall see fit so to do, to cause the record on which any trial may be pending before any such Court or judge, in any civil action, or in any indictment, &c., when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended,” &c. It was never intended that there should be a substantive application to amend, otherwise the object of the statute would fail. *Rastall v. Straton* (a) and *Munkenbeck v. Bushnell* (b) are authorities to shew that the amendment may be made.

PER CURIAM (c).—There must be judgment for the defendant, and the plaintiff must make a separate application to amend.

Judgment for defendant.

(a) 1 H. Bl. 49.

(b) 4 Dowl. P. C. 139.

(c) *Pollock, C. B., Parke, B., Rolfe, B., and Platt, B.*

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REGINA v. ADAMS and WARREN.

May 2.

M. D. HILL moved for a rule calling on her Majesty's Attorney-General to shew cause why two writs of extent in chief, issued against Adams and Warren, should not be set aside.—It appeared that Adams and Warren were bankers at Shrewsbury, having also a branch bank at Market Drayton. An account was kept at the Shrewsbury bank by a tax-collector, of the name of Onions, in which his own private monies and the monies paid to him for taxes were blended together. The bankers were in the habit of balancing this account half-yearly, and they allowed Onions from time to time interest on the receipts over the payments at each half-yearly balance. On the 4th November, 1847, an extent issued for the recovery of this interest, as well as the money received by Onions for taxes. An account was kept at the Market Drayton bank by a tax-collector of the name of Moore, who had received, in payment of taxes, several promissory notes of Adams and Warren, payable to bearer on demand. These notes were still in the possession of Moore; and on the same 4th November another extent issued against Adams and Warren for the recovery of their amount, as well as other monies received by Moore for taxes, and by him paid into the Market Drayton bank. The present application was made on behalf of the assignees of Adams and Warren, against whom a fiat in bankruptcy issued on the 8th November, 1847.—It is conceded, that, after the case of *Rex v. Ward* (a), the extent cannot be successfully impeached so far as relates to the money received on account of taxes; but it is submitted, first, that the Crown is not entitled to recover the interest allowed to Onions on the half-yearly balance,

An extent in chief may issue against a banker for the recovery of interest allowed by him on the half-yearly balance of a tax-collector's account, in which his own and the Crown monies are blended together. Also to recover the amount of a banker's promissory note in the hands of a tax-collector, and received by him in payment of taxes.

(a) See the note at the end of this case.

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inasmuch as interest is a matter of contract between the bankers and their customer. [*Pollock*, C. B.—It may be difficult to trace the money of the Crown, when once mixed up with the general funds of any person; but still it may be followed wherever the evidence leads. If so, its proceeds may also be followed; for instance, if an estate were purchased, the crops might be taken; or if stock were bought, the dividends might be taken. In like manner, if money paid for taxes is deposited with a banker, whose practice it is to pay interest on the floating balance, the Crown is entitled to that interest.]—Secondly, an extent cannot issue in respect of the promissory notes. These notes have never been brought into the account between the bankers and the tax-collector; and the effect of this extent would be to give him a preference over other creditors, since the Crown would be paid in full. The tax-collector was not bound to take these notes, but might have insisted upon money; not having done so, he has no claim beyond the other creditors. Suppose the bankers were utterly without effects, the tax-gatherer must pay the Crown; if the tax-gatherer were insolvent, his assignees would only stand in the position of any other creditor, and prove against the bankrupt's estate. This proceeding is a mode of evading the 57 Geo. 3, c. 117, by turning that which ought to be an extent in aid into an extent in chief. [*Platt*, B.—You ought to plead to the extent.] *Rex v. Shackle* (a) is an authority to shew that the Court will interpose on motion.

POLLOCK, C. B.—There ought to be no rule. The first point is, whether the Crown is entitled to the interest allowed by the bankers on money deposited with them by a tax-collector; and we are all clearly of opinion that the Crown is so entitled.

(a) 11 Price, 772.

The other point is, whether an extent in chief lies to enforce the payment of notes issued by a country bank payable to bearer, and received by a collector from a tax-payer. We are of opinion, that, immediately the notes were paid to the collector, they became a debt due to the Crown, and that an extent might issue against the bankers for the purpose of enforcing payment. If the notes are paid over by the collector to the bankers after their bankruptcy, that is a matter of pleading, but cannot affect the extent on motion.

PARKE, B.—The notes are received by the collector as payment to the Crown, and the Crown may adopt that, and obtain all the rights of suing on the notes. The bankruptcy and assignment do not afford any ground for setting aside the extent.

PLATT, B., concurred.

Rule refused.

REX v. WARD.

SIR W. FOLLETT (on the 21st November, 1836) moved for a rule calling on his Majesty's Attorney-General to shew cause why a writ of extent in chief, issued against the Ward, for recovering the sum of £1038, and all proceedings had thereon, should not be set aside. The extent issued on the 7th November, 1836, upon the affidavit of Richard Rixon, a collector of taxes, stating that Ward, trading on the business of a banker at Woolwich, in Kent, was indebted to his Majesty in the sum of £1038, arising from

the rates and duties collected and received by the said Richard Rixon from the inhabitants of Woolwich, and deposited with Ward for safe custody until payment to the Receiver-General of Stamps and Taxes; that Ward was insolvent, and had stopped payment as a banker, by reason whereof the said sum was in danger of being lost, &c. The present application was made on behalf of the official assignee of Ward, against whom a fiat in bankruptcy issued on the 8th November, 1836, and was supported by the joint affidavit of the as-

signee become insolvent—*Held*, that an extent in chief might issue against him for the Crown monies, the amount being a question for a jury.

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signee and Ward, the latter of whom deposed, that Richard Rixon never kept any account, nor had any dealing or transaction with him; that an account had for several years past been kept with deponent, as a banker, by John Rixon, the father of Richard Rixon, and that such account was kept in the name of John Rixon only, and as his private account; that when any monies were paid in to the account kept by John Rixon, they were generally paid in by John Rixon himself, and no part of the money paid in to such account was distinguished from any other part, but the same were all paid in to and blended together in one account; that all checks drawn on deponent in respect of the monies so paid in were signed by John Rixon, and John Rixon drew on deponent from time to time for the same, as he, the said John Rixon, thought fit.—The official assignee deposed, that he had examined the books of account kept by Ward, and that the only account appearing therein kept with any person of the name of Rixon was headed “John Rixon.”

The Court being of opinion that the affidavit of Ward was defective, in not stating that he did not know that any part of the money belonged to the Crown, an additional affidavit was filed, wherein Ward deposed, “that he never had notice, nor did he ever positively know that the monies paid into his hands by John Rixon, or any part thereof, be-

longed to his Majesty, although he certainly did believe that some part of the monies so paid into his hands by John Rixon might have been originally received for taxes; but what amount thereof, or what particular monies were or was so received, the deponent never had the slightest idea.”

The *Attorney-General* shewed cause, (January 28, 1837), upon affidavits, that John Rixon had formerly been the collector of taxes; and that Richard Rixon, his son, who succeeded him, was in the habit of paying the money received on account of taxes to his father, who paid it into the bank to his private account; that Ward knew that some of the money so paid in was received on account of taxes, and used to ask when it would be necessary to have the money ready for the Receiver-General. He cited *Res v. Wrangham* (a) as an authority to shew, that Ward, having received the money of the Crown, became an immediate debtor to the Crown.

Sir *W. Follett*, in support of the rule.—The question is, whether, under the circumstances, an extent in chief can issue against the banker, who kept an account with Rixon, the father, and not with the son. [*Parks*, B.—The law is, that any one is in privity with the Crown who knows that the money which he receives is the money of the Crown; therefore, an extent in chief may issue

(a) 1 C. & J. 408.

for all sums which the banker received, knowing them to be the monies of the Crown.] The banker had no knowledge that any particular sums belonged to the Crown, but only that money received for taxes was paid in by Rixon, the father, together with his own money. [*Parke, B.*—That would be a question of fact, on comparing the extent of these

transactions with the amount paid in. If the transactions of the customer were very small, and those of the Crown very large, a jury might come to the conclusion that the whole belonged to the Crown.]

PER CURIAM (a).—The rule must be discharged.

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(a) Lord Abinger, C. B., *Parke, B.*, and *Gurney, B.*

BELCHER and Others, Assignees of HANNEN, a Bankrupt,
v. BELLAMY and Another, Executors of WINSLAND.

May 9.

ASSUMPSIT against the defendants, as executors of N. Winsland, deceased, for money had and received by Winsland in his lifetime for the use of the plaintiffs as assignees. The defendants pleaded that they did not promise; and issue having been joined thereon, the following case was, by consent, stated for the opinion of this Court:—

In 1843, before the bankruptcy of Hannen, R. D. Hawkins, residing at Port Adelaide, in South Australia, was indebted to the bankrupt in 771*l.* 3*s.* 4*d.*, being the debt referred to in the letter of the said N. Winsland, of the 22nd January, 1844, which debt is not yet wholly paid. In 1843, the bankrupt directed Hawkins to make his remittances on account of this debt to the bankrupt's son, J. Hannen, jun.

Afterwards, and before the bankruptcy, viz. on the 8th

H., residing in Australia, was indebted to A. in 771*l.* 3*s.* 4*d.* On the 8th January, 1844, A., bonâ fide, and for a valuable consideration, assigned the debt to W., and on the 22nd January joined W. in a letter notifying to H. the assignment, and requiring him to pay the debt to W. This letter was posted on the 1st February, 1844, in the ordinary way in which letters to New South

Wales are posted, and could not have reached Australia before the 10th February, on which day a fiat in bankruptcy issued against A. On the 29th January, 1844, H. remitted, by letter, 50*l.*, which was received after the fiat and delivered over to W. The assignees of A. having sued W. for the amount—*Held*, that, W. having taken every possible step to obtain possession of the debt, it could not be said to remain in the order and disposition of the bankrupt, with the consent of the true owner, within the meaning of the 72nd section of the 6 Geo. 4, c. 16.

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January, 1844, the bankrupt, *bonâ fide*, and for a valuable consideration, by deed, assigned to the said N. Winsland the debt due from Hawkins, and all his, the bankrupt's, interest therein, so far as he could by deed assign the same. On the 1st February, 1844, and before the bankruptcy, N. Winsland posted, in the ordinary way in which letters to New South Wales are posted, a letter to Hawkins, with the concurrence of the bankrupt, signed by him at the foot thereof, of which letter and concurrence the following are true copies:—

“To Mr. R. D. Hawkins, Adelaide, New South Wales, —I, the undersigned Nicholas Winsland, &c., hereby give you notice, under and by virtue of a certain indenture bearing date the 18th of January instant, and made between James Hannen therein described of the one part, and myself of the other part, certain goods, or the proceeds thereof, and all monies now due, or to become due, from you to the said James Hannen in respect thereof, amounting to 771*l.* 3*s.* 4*d.*, were assigned and transferred to me, the said Nicholas Winsland. And I give you further notice, and require you to make all further remittances on account of the said goods or monies to me or to my credit at my bankers', Coutts & Co., Strand, London, whose acknowledgment will be your sufficient discharge. Dated this 22nd day of January, 1844.

“NICHOLAS WINSLAND.

“Witness, John Burder,” &c.

“I concur in the above notice. Dated this 22nd day of January, 1844.

“JAMES HANNEN.

“Witness, John Burder, William Gozzard.”

The fiat issued on the 10th February, 1844. The letter could not have reached Port Adelaide by that day; and Hawkins had no notice of the assignment at the date of the fiat, nor at the date of the bill hereinafter mentioned; nor could any other letter have reached Port Adelaide on or

before the 10th February, if the same had been regularly posted on the said 8th January, 1844; nor could the said N. Winsland by any means have communicated to the said Hawkins, or have given him notice of the aforesaid assignment, or the fact of the execution of the aforesaid deed, before the issuing of the said fiat, or the date of the said bill hereinafter mentioned. Save as aforesaid, nothing had been done to prevent the debt from being in the reputed ownership of the bankrupt.

On the 29th January, 1844, a bill for £50 was remitted to the bankrupt's said son, James Hannen, jun., in a letter from Hawkins, which was received by the bankrupt's said son after the issuing of the fiat, and after he had notice from the said N. Winsland of the aforesaid assignment from the bankrupt. The letter stated that the inclosed bill for £50 on the Bank of South Australia was in favour of J. Hannen, jun.; and the bill was remitted to him, and received by him in pursuance of the direction aforesaid, on account of the debt due from the said R. D. Hawkins. On receiving this bill of exchange, J. Hannen, jun., having been indemnified by N. Winsland, inclosed and delivered the bill to him, and the amount thereof was received by the said N. Winsland.

The Court was to be at liberty to draw any inference of fact that a jury might draw.

The question for the opinion of the Court was, whether the assignees were entitled to recover the proceeds of the bill from the defendants, as executors of the said N. Winsland. If they were, then the defendants were to withdraw their plea, and judgment by default was to be entered for the plaintiffs, with damages £50, with interest at 5l per cent. from the 16th September, 1844, by confession. If not, a nolle prosequi was to be entered.

Bramwell, for the plaintiffs.—The case falls within the 72nd section of the Bankrupt Act, 6 Geo. 4, c. 16, which

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is an extremely beneficial clause, having for its object the preventing traders from obtaining false credit by the apparent ownership of property. The enactment is, indeed, qualified by a statement that the reputed ownership shall be with the consent of the true owner; but that means a permissive occupation not contrary to his consent. In this case, the defendants' testator consented; for he took an assignment of the debt with full knowledge that the bankrupt must remain for some months the reputed owner of it. [*Pollock*, C. B.—The fallacy of your argument lies in assuming that he consented because he put himself in the situation of being the true owner. But when he consented, he was not the true owner; and as soon as he became so, he dissented.] If goods once vested in the purchaser be allowed to remain in the possession of the vendor for any time, however short, they will, in the event of his bankruptcy, pass to the assignees. It is not necessary that there should be a willingness of mind on the part of the real owner, but merely a state of things which he might have prevented if he thought fit. Suppose money is left to a woman on condition of her marrying with her guardian's consent, and, such consent being given, the marriage takes place in a distant country; can it be said that there was no consent because the guardian, having discovered that the husband was an unworthy person, afterwards, and before the marriage, became desirous of signifying his dissent, but was prevented by distance from so doing? This view of the section is fortified by the words, "or whereof he had taken upon him the sale, alteration, or disposition, as owner." Again, the proviso as to the mortgage or assignment of ships shews that the construction contended for is correct; for that proviso would be unnecessary if the possession were against the consent of the mortgagee, in cases where he could not prevent it. *Livesay v. Hood* (a) decided that goods in the hands of a

(a) 2 Campb. 83.

retail dealer upon sale or return passed under a commission of bankruptcy against him by the 21 Jac. 1, c. 19. [*Parke, B.*—The cases relating to the assignment of goods abroad have always turned upon whether the assignee has done all in his power to get possession of the property. In *Brown v. Heathcote (a)*, a debtor assigned to his creditor certain goods in two ships then at sea, and delivered to him the bills of lading and invoice; and the debtor having become bankrupt, it was held, that, as everything which could shew a right to the goods was delivered over to the creditor, the bankrupt could not be said to have the order and disposition of the goods. Your argument amounts to this, that goods at sea can never be purchased so as to defeat the claim of the assignees, in the event of the vendor becoming bankrupt. But, in general, there exist some indicia of property, as bills of lading, &c. In fact, your argument goes to this length, that no goods at a distance could be safely purchased at all.] The purchase of the debt, with knowledge that it must of necessity remain for some time in the order and disposition of the bankrupt, is of itself a consent. Suppose the deed of assignment had contained a covenant not to give notice to the debtor for three months; according to the argument on the other side, that would not have been a consent, because the debtor could not possibly receive notice of the assignment within that period. The fallacy is in supposing that there must be a continuing consent. [He cited 1 Mont. & Ayr., Bankrupt Law, 854; *Lingard v. Messiter (b)*; *Fletcher v. Manning (c)*.]

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Peacock appeared to argue for the defendants on the 8th May, the plaintiffs' counsel being then absent; and, after citing *Burn v. Carvalho (d)*, *Load v. Green (e)*, and *Fletcher v. Manning*, was stopped by the Court.

(a) 1 Atk. 160.

(b) 1 B. & C. 308.

(c) 12 M. & W. 571.

(d) 4 Myl. & Cr. 690.

(e) 15 M. & W. 216.

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POLLOCK, C. B.—It is probable that this clause of the statute was not intended to apply to debts, but only to cases in which there was a visible possession and apparent ownership of property, which gave to the trader the semblance of wealth, and so enabled him to obtain credit. But, since the case of *Ryall v. Rolle* (a), it is too late to doubt whether debts are within the enactment. The question as to debts has never received the same consideration as that of goods and chattels, because in reality no man has an apparent ownership of debts, or obtains credit by means of them, since debts are generally unknown. The question as to debts has chiefly arisen in cases of assignments of debts, bonds, and policies of assurance, where upon the assignment no notice has been given; and it has been held that the debts still remained in the order and disposition of the bankrupt, with the consent of the true owner. No doubt the statutes of bankruptcy passed with a view to a different state of things from that which now prevails; and, if we were called upon for the first time to put a construction on those statutes, it may be that we should not concur in all the decisions. I differ from Mr. *Bramwell* in opinion that this is an extremely beneficial clause, and one to be enforced in every case. It would very much paralyse commercial transactions, if it were necessary that every transfer of the property in goods should be accompanied by an instantaneous delivery. The modern rule is, that goods are not deemed to be in the possession of a trader, with the consent of the true owner, if the latter takes every possible pains to obtain possession of them. The question then is, whether the true owner in this case consented to the goods remaining in the possession of the bankrupt. He certainly did not; for, immediately he became owner, he took every possible step to give effect to the assignment—namely, by sending notice to the debtor; but before the notice arrived,

(a) 1 Atk. 165; S. C., 1 Ves. 348, nom. *Ryall v. Rowles*.

the assignor of the debt became bankrupt. It is argued, that, because the plaintiff took an assignment of the debt, he consented to its remaining with the bankrupt. I cannot agree to that. The assignee took the debt with a right to claim it instantar, and he does so, as far as time and space will permit. Our judgment must, therefore, be for the defendant.

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PARKE, B.—I am of the same opinion. I concur in the observations of the Lord Chief Baron with reference to the statutes of bankruptcy. In the first instance, they were not supposed to apply to choses in action. That, however, was settled by the case of *Ryall v. Rolle*. It cannot be doubted that the bankrupt law was originally made when commerce was in a very different state from the present, and that at this period the legislature would not enable a bankrupt to pay his debts with the goods of another person. Whatever may have been the state of commerce in the time of James I, it is evident that, at the present day, a trader does not obtain credit by the possession and apparent ownership of other persons' goods, but in consequence of his general estimation as a merchant. However, be that as it may, we must construe the Bankrupt Act as it stands, and then it is clear that the present case is not within its provisions. In order to be so, there must be a real owner, distinct from the apparent owner, and the real owner must have consented that the trader should have possession of the goods. There cannot be a better explanation of the statute of James (a) than the judgment of Lord *Redesdale* in the case of *Joy v. Campbell* (b), where, in construing a similar clause in the Irish Act (11 & 12 Geo. 3, c. 8, s. 9), he states it to mean, "Where the possession, order, and disposition is in a person who is not the owner, to whom the goods do not properly belong, and who

(a) 21 Jac. 1, c. 19, s. 11.

(b) 1 Scho. & Lef. 336.

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ought not to have them, but whom the owner permits, unconscientiously as the act supposes, to have such order and disposition. The object was to prevent deceit by a trader, from the visible possession of property to which he was not entitled; but in the construction of the act the nature of the possession has always been considered, and the words have been construed to mean, possession of the goods of another, with the consent of the true owner." Apply that to the present case. The real owner was the defendant, to whom the debt was assigned. The assignment bound the assignor in equity; and when the defendant had taken all proper steps to obtain possession of the debt, he became entitled to it, both at law and in equity; and the bankrupt's assignees could not claim it, unless the defendant had unconscientiously permitted it to remain in the possession of the bankrupt. It appears, however, that he could not prevent it, and that everything was done that could be done, so that it is impossible to say the real owner consented to the bankrupt retaining possession. In *Load v. Green* (a), trover was brought for goods obtained by a party, afterwards bankrupt, with the fraudulent intention of never paying for them, and that was held sufficient to prevent the operation of the statute. According to Mr. *Bramwell's* argument, in all cases where there is a purchase of goods, under such circumstances that the vendee cannot possibly have immediate possession, he consents to their remaining in the possession of the vendor. If that argument were correct, the effect would be to prevent any assignment of goods abroad, and all commerce with respect to such goods must be at an end. The case suggested, of an assignee of a debt binding himself not to give notice to the debtor within a certain period, might be a case of possession by the debtor with the consent of the true owner, because during the stipulated time he absolutely precludes

(a) 15 M. & W. 216.

himself from taking any step to prevent the debt from remaining in the order and disposition of the bankrupt. That point, however, it is unnecessary to decide. Here, the moment the assignment took place, the assignee of the debt used every means in his power to obtain possession of it.

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ROLFE, B.—I am of the same opinion. The 72nd section enacts, “that, if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels, whereof he was reputed owner,” they shall pass to his assignees. Now, it is quite clear that the “consent and permission” there spoken of is something which must be proved, not to be inferred from the mere fact of nothing being done. Were it not for the decisions, I should have thought it extremely doubtful whether a *debt* could be said to be left in the order and disposition of a bankrupt, with the consent of the true owner; but the doctrine in *Ryall v. Rolle* has prevailed so long, that we are bound by it: therefore a person, purchasing a chose in action, is considered to leave it in the possession of the debtor, unless he is active and gives notice; although, if he takes every possible step to give notice, and the debt nevertheless remains in the possession of the bankrupt, it does not so remain with the consent and permission of the purchaser. If, as suggested by Mr. *Bramwell*, he does not give notice for three months, during that period the debt remains in the order and disposition of the debtor; but the moment he gives notice, it is otherwise; and the fact, that many months must elapse before the notice can take effect, does not alter the case.

PLATT, B., concurred.

Judgment for the defendants.

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April 15.

ESDAILE (Public Officer, &c.) v. TRUSTWELL.

A declaration in scire facias on a judgment recovered by E., the public officer of the London and Westminster Bank, against the public officer of the Leeds and West Riding Banking Company, for the sum of 51,373*l.* 12*s.* 7*d.*, having been demurred to, the plaintiff amended, and, within two days after the amendment, the defendant pleaded in abatement, that, at the very same time when the writ issued, and before E. declared, E., then being public officer, issued a writ of scire facias against D., another member of the company, at the time of judgment recovered.

The plea set out the writ and declaration, and averred that the judgments mentioned in the two writs of scire facias were one and the same judgment; and that, at the time of the recovery of the judgment and the issuing of the writ of scire facias against the defendant, D. was a member of the co-partnership. It then averred the identity of the companies, and that D. was alive, and the suit against him still pending. The affidavit in verification of this plea stated, that the paper-writing thereto annexed was a true copy of the issue, wherein E., as such public officer, was plaintiff, and D. defendant; and that judgment was signed in such action by E. against D., on &c., for the sum of 51,373*l.* 12*s.* 7*d.* The plaintiff having signed judgment, on the grounds that the defendant was not entitled to plead in abatement, and that the affidavit of verification was insufficient—*Held*, that the judgment was regular, inasmuch as the affidavit did not state even the defendant's belief that the two writs issued at the same time. But *semble*, that the defendant was entitled to plead in abatement.

THIS was a rule calling on the plaintiff to shew cause why the judgment signed herein, and all subsequent proceedings, should not be set aside, and why an order of *Platt*, B., should not be rescinded, under the following circumstances:—The plaintiff having declared in scire facias upon a judgment recovered by him as registered public officer of the London and Westminster Bank, against the registered public officer of the Leeds and West Riding Banking Company, for the sum of 51,373*l.* 12*s.* 7*d.*, the defendant demurred to the declaration. The demurrer came on for argument on the 17th November, when, at the suggestion of the Court, the plaintiff elected to amend the declaration and writ (*a*), by alleging that “R. Trustwell is a member of the said co-partnership.” On the 29th November, being two days after the amendment, the defendant pleaded in abatement, “that, at the very same time that the said writ close issued, and before the said J. Esdaile declared, to wit, on &c., the said J. Esdaile, then being one of the registered public officers of the co-partnership in the declaration mentioned, for the purpose of carrying on, and then carrying on, the trade and business of bankers in England, &c., (and which said J. Esdaile had then been duly nominated and appointed such registered public officer as

(a) See the case, 1 Exch. 371.

aforesaid, and then sued as nominal plaintiff for and on behalf of the said persons united in co-partnership as aforesaid, under and by virtue of the provisions of the statutes passed in that behalf), issued a certain writ close of our Lady the Queen, which said writ close, at the time of the issuing thereof, was in the words and figures following, that is to say," (the writ was then set out at length, and stated that J. Esdaile, registered public officer &c., had recovered against G. Smith, the registered public officer of the Leeds and West Riding Banking Company, the sum of 51,373*l*. 12*s*. 7*d*., which was adjudged to the plaintiff, and that John Dawson, of Pudsey, near Leeds, at the time of such judgment, was, and from thence hitherto hath been and still is, a member of the said co-partnership. Then followed the usual command to the sheriff to make known to the said J. Dawson, &c., and the sheriff's return of nil). The plea then set out the declaration against J. Dawson, and proceeded thus:—
 "And the said R. Trustwell further says, that the judgment mentioned in the last-mentioned writ of scire facias, and the judgment mentioned in the said writ of scire facias so issued against the said R. Trustwell, are one and the same judgment, and not other and different judgments; and that, at the time of the recovery of the said judgment, and thence continually up to and at the time of the issuing of the said last-mentioned writ of scire facias against the defendant, the said J. Dawson was a member of the said co-partnership, and that the said co-partnership, in the said several writs of scire facias described as 'The Leeds and West Riding Banking Company,' were one and the same co-partnership; that, at the time of the recovery of the said judgment, the said G. Smith was one of the registered public officers of the said co-partnership; and the said co-partnership was a co-partnership of persons united in co-partnership for the purpose of carrying on, and then carrying on, the trade and business of bankers in England, according to the provisions of the statute made and passed

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in that behalf, under and by the style or title of 'The Leeds and West Riding Banking Company;' and that, at the time of the recovery of the said judgment, the said G. Smith had then been duly nominated and appointed, and then was such registered public officer as aforesaid, by virtue of the statute in that case made and provided; that the said J. Dawson is still alive, and that the said writ of scire facias against the said J. Dawson, and the suit so thereby commenced against the said J. Dawson, are still depending in the court of our Lady the Queen, before the Barons of her Exchequer, and still are undetermined." Verification, and prayer of judgment of the writ and declaration.

The affidavit in verification of the above plea was as follows:—"In the Exchequer of Pleas.—Between J. Esdaile, one of the registered public officers of certain persons, united in co-partnership, for the purpose of carrying on, and carrying on, the trade and business of bankers in England, under and by the style or title of 'The London and Westminster Bank,' plaintiff; and Richard Trustwell, defendant.—Andrew Duncan the younger, clerk to Andrew Duncan, of &c., agent for the defendant in this cause, maketh oath and saith, that the paper-writing hereto annexed, marked (A), is a true copy of the issue wherein the said J. Esdaile, as such public officer as aforesaid, is the plaintiff, and J. Dawson, of Pudsey, near Leeds, in the county of York, is defendant. And the deponent further saith, that judgment was signed in the last-mentioned cause by the said J. Esdaile, as such public officer, against the said J. Dawson, in this honourable court, on the 15th day of November instant, for the sum of 51,373*l.* 12*s.* 7*d.* damages, and 33*l.* 11*s.* costs, as appears by the judgment-book of this honourable court, which deponent has inspected. Sworn" &c.

After the delivery of the above plea and affidavit, the plaintiff signed judgment, on the grounds, first, that the

defendant was not entitled to plead in abatement; secondly, that the affidavit of verification was insufficient. On the 9th of December a summons was taken out to set aside the judgment for irregularity, which summons was heard by *Platt*, B., and dismissed. In last Hilary Term the present rule was obtained, against which

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Bovill shewed cause.—First, the practice of allowing two days' time to plead to a declaration amended after demurrer (*a*) does not authorise the defendant to plead in abatement, but he must obtain an order for that purpose. It is like a special imparlance under the old practice, which was necessary to enable a defendant to plead in abatement within the first four days of the next term after the delivery or filing and notice of declaration: *Tidd's Prac.* 462. The amended declaration cannot be treated as a new declaration; therefore the defendant, by demurring, has waived his privilege of pleading in abatement. Secondly, the affidavit of verification is insufficient. Great strictness is required in affidavits in support of dilatory pleas. In *Onslow v. Booth* (*b*), "a plea of privilege of clerk to a prothonotary in Common Bench was set aside, the affidavit annexed to it being, *that this is a true plea*, and not *that the plea is true*, the statute requiring the affidavit should establish the fact, and not the legality of the plea." [*Parke*, B.—Any affidavit is sufficient, which satisfies the conscience of the Court that the plea is true.] The present affidavit is defective in many particulars. It does not shew that the judgment recovered against *J. Dawson* was recovered in the action now brought against the present defendant, but only that the names and sums are the same. There is nothing to identify the debt or the banking companies; nor is there any allegation that *J. Dawson* was a member of the Leeds and

(*a*) See *Smith v. Hearn*, 12 M. & W. 715; 1 Dowl. & L. 992.

(*b*) 2 Stra. 704.

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West Riding Bank. Then, with respect to the plea in abatement, the first allegation is, that, at the time the writ issued, and before Esdaile declared, he issued a scire facias against J. Dawson; and then follows an allegation of the sheriff's return of nil. The averment, that the judgments are one and the same, which was necessary to make the plea good, is wholly unsupported by the affidavit; so also the averment of the identity of the parties and the banking companies. The latter part of the plea is contradicted by the affidavit; for the former alleges that the suit against Dawson is still depending, while the latter states that judgment has been signed.

T. Jones, in support of the rule, was desired by the Court to confine his argument to the sufficiency of the affidavit.—The plea is framed on the 7 Geo. 4, c. 46; and the defendant contends that execution must issue against one or several members of the co-partnership, and that separate concurrent writs of scire facias cannot issue against different individuals who were members of the company at the time the judgment was obtained: *Esdaile v. Lund* (a). It is similar to the case of several persons jointly and severally liable for a debt. This affidavit sufficiently makes out the proposition, that, at the time when the writ issued against Trustwell, another writ also issued against Dawson. There is no rule which requires pleas in abatement to be distinctly and positively verified in terms; it is sufficient if the Court can see from the facts stated that there is reasonable ground of defence. In many cases, it would be unjust to require more. A defendant may honestly suppose that he has an answer to the action by reason of the non-joinder of a partner as co-plaintiff; but still he may be unable to swear positively to the fact of partnership. The stat. 4 Anne, c. 16, s. 11, distinguishes between positive proof in

(a) 12 M. & W. 607.

terms, and proof from which the Court may draw a conclusion. It enacts, "that no dilatory plea shall be received in any court of record, unless the party offering such plea do, by affidavit, *prove the truth thereof*, or shew *some probable matter* to the Court to induce them to believe that the fact of such dilatory plea is true." The plea and affidavit, coupled together, shew sufficient "probable matter," within the latter branch of the section; for it appears that the names and sums are identical. [*Parke*, B.—It is not shewn that the two writs issued at the same time. The defendant does not even say that he believes that they issued at the same time.]

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POLLOCK, C. B.—The rule must be discharged. If the defendant will not swear that he believes the two writs to have issued at the same time, why are the Court to infer it?

PARKE, B.—I concur in opinion. With respect to the first point, it is unnecessary to make any observation.

ROLFE, B., and PLATT, B., concurred.

Rule discharged.

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April 20.

CALDWELL and Others v. BECKE.

A joint and several covenant by A. and other persons, that "they or some or one of them" will pay a certain sum, may be declared upon as a covenant by A. to pay, and debt will lie on such a covenant.

DEBT.—The declaration stated, that on the 30th August, A.D. 1845, by a certain indenture then made by the defendant (profert), the defendant did, for himself, his heirs, executors, &c., covenant with the plaintiffs, their executors, &c., that he, the defendant, would pay to the plaintiffs, their executors, &c., the sum of £250, and interest thereon at the rate of £5 per cent. per annum, on the 30th August then next, that is to say, on the 30th August, A.D. 1846, without any deduction whatsoever, prout patet, &c. Averment, that, although the plaintiffs have performed all things in the indenture on their part to be performed, and although the 30th August, A.D. 1846, elapsed before the commencement of the suit, yet the defendant did not, on the 30th August, A.D. 1846, or at any time, pay to the plaintiffs the said sum of £250 and interest &c.

The defendant pleaded non est factum, after setting out on oyer the indenture, which was made the 30th August, A.D. 1845, between Francis Augustus Burdett Bonny, (thereinafter, for the sake of brevity, styled "the said borrower"), of the first part; William Ralfe, William Bonny, and George Becke, of the second part; and Frederick Caldwell, Henry Chilton, and Frederick Fuller, of the third part. After reciting, that "by a policy of assurance of the English and Scottish Law Life Assurance and Loan Association, the funds of the association were charged with the payment to the executors, &c. of the said borrower of £500 within three months after proof of his decease;" also reciting, that "the said borrower had agreed with the said parties thereto of the third part for the loan of £250 on the security of an assignment of the said policy, and also by the joint and several covenants of the said borrower, and of the said parties thereto of the second part:" it was witnessed, that, in consideration of £250 to the said borrower paid by

the parties of the third part, the said borrower, &c., assigned to them the policy, with a proviso for redemption on repayment of £250 and interest. The following was the covenant on which the action was brought:—"And the said borrower, and, as his sureties, the said parties hereto of the second part, do hereby, for themselves, their heirs, executors, and administrators, jointly and severally covenant with the said parties hereto of the third part, their executors, administrators, and assigns, that they the said parties hereto of the first and second parts, or some or one of them, their or some or one of their executors, administrators, or assigns, will pay to the said parties hereto of the third part, their executors, administrators, or assigns, the said sum of £250 and interest as aforesaid, on the 30th day of August next, without any deduction whatsoever."

At the trial, before *Pollock*, C. B., at the Middlesex Sitings after last Hilary Term, it was objected, on the part of the defendant, that there was a variance between the covenant set out in the declaration and that contained in the indenture; also that *debt* would not lie on this covenant. The learned judge directed a verdict for the plaintiffs, reserving leave for the defendant to move to enter a nonsuit.

Martin now moved accordingly.—There is either a variance, or debt will not lie. The covenant contained in the indenture is not an absolute covenant to pay, but a collateral covenant that the defendant and the parties of the second part, or some one or other of them, shall pay. In *Harrison v. Matthews* (a), the declaration stated that, by an indenture made between J. H. of the first part, the defendant of the second part, W. A. the elder of the third part, W. A. the younger of the fourth part, and the plaintiff of the fifth part, the defendant covenanted with the plaintiff, that they, the defendant, the said J. H., W. A. the elder,

(a) 10 M. & W. 768.

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and W. A. the younger, or some or one of them, should or would pay or cause to be paid unto the plaintiff £300; and that was held a collateral covenant, and that the action for the recovery of the money ought to be in covenant, and not in debt. [*Parke, B.*—There the covenant was by the defendant, that he and three other persons, not parties to the indenture, or some or one of them, would pay.] The legal effect of this covenant is improperly stated in the declaration: the breach should have been, that neither the defendant and the parties of the second part, or any one of them, paid. [*Parke, B.*—The covenant is by the defendant and other persons, that they, “or some or one of them,” shall pay; and that is declared upon as a covenant that the defendant would pay. *Addison v. Gibson* (a) shews that to be no variance.]

Rule refused.

(a) 10 Q. B. 106.

May 2.

DEAKIN, and HANNAH his WIFE, v. PENNIAL.

An agreement made in 1840, when the 55 Geo. 3, c. 184, required a £1 stamp, was, subsequently to the 7 & 8 Vict. c. 21, stamped under a penalty with a 2s. 6d. stamp:—*Held*, that the agreement was admissible in evidence.

ASSUMPSIT for money lent to the defendant by the plaintiff Hannah, whilst she was sole and unmarried, and for money due on an account stated. Plea, non assumpsit; upon which issue was joined.

At the trial, before *Pollock, C. B.*, at the Middlesex Sittings after last Michaelmas Term, the plaintiffs gave in evidence the following document, signed by the defendant:—

“January 1, 1840.

“Miss Hannah Penniall,—I. O. U. ten pounds, which I promise to pay you when I shall have received my legacy which my aunt shall leave me.”

The document had been stamped, on payment of the

penalty, with the stamp of 2s. 6d., pursuant to the 7 & 8 Vict. c. 21, s. 2, "Schedule," which received the royal assent in 1844. The defendant's counsel objected to the reception of this document, on the ground that, having been made in 1840, at which time the 55 Geo. 3, c. 184, (Schedule, Part I., "Agreement"), was in force, it required an agreement stamp of £1. The learned judge overruled the objection, and admitted the document, reserving leave for the defendant to move to enter a nonsuit.

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Willes, on the 29th April, moved accordingly.—The 7 & 8 Vict. c. 21, "Schedule," imposes a duty of 2s. 6d. "for and in respect of every agreement, or minute or memorandum of an agreement, now chargeable with the duty of one pound, under the head or title of "Agreement," in the schedule to the act 55 Geo. 3, c. 184, annexed." But this agreement, having been made before that statute passed, ought to have been stamped with the £1 stamp, required by the 55 Geo. 3, c. 184. The stamp duty is in the nature of a grant to the Crown, and is due immediately the contract is entered into. [*Pollock*, C. B.—Suppose parties sign an unstamped agreement, and in a short time afterwards something occurs which renders the agreement unnecessary, and therefore it is destroyed; do you contend that any duty would be due?] The penalty accrues as soon as the time has passed within which the document should be stamped. [*Parke*, B.—Your argument would go to this extent, that wherever parties wrote an unstamped agreement, the Attorney-General might file an information for the duty.] The 37 Geo. 3, c. 136, s. 2, was the first statute which enabled the Commissioners to stamp instruments unstamped, or on stamps of less than the legal value, upon payment of the duty and £10 penalty; but there is an express exception as to bills of exchange and promissory notes. That provision was made with reference to a series of enactments giving a right to duty. The 23 Geo. 3, c. 58, imposed a duty of 6s. on

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every agreement; and the 5th section provides, that no agreement, not stamped, shall be deemed to be void, in case the same shall be stamped within twenty-one days after the same shall be entered into.

Cur. adv. vult.

POLLOCK, C. B., now said.—In the case of *Deakin v. Penniall* there will be no rule. In *Buckworth v. Simpson* (a), where an instrument, which was in reality a lease, but which bore an agreement stamp for 15s., was executed in 1805, at which period the amount of the stamp on a lease, according to the act then in force, was 1*l* 10s., but was stamped, in 1834, under the provisions of the 37 Geo. 3, c. 136, s. 2, with a stamp of £1, being the amount of the stamp then in force it was decided that the proper duty had been paid. It was there said by Lord Abinger, C. B., in his judgment, that “the statute authorises the demand of the duties in force at the time when the stamp is affixed.” That decision and observation applies precisely to the present case. There will, therefore, be no rule.

PARKE, B.—The same point was decided in *Doe d. Dyke v. Whittingham* (b).

Rule refused.

(a) 1 C. M. & R. 834.

(b) 4 Taunt. 20.

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HILLS and Others v. HAYMEN.

May 4.

THIS was a rule calling on the defendant to shew cause why an order of *Alderson*, B., setting aside a judgment signed in this cause, should not be rescinded.

The declaration contained a count on a bill of exchange for £100, drawn by the defendant and indorsed to the plaintiffs, and also counts for money paid and money due on an account stated. The defendant obtained leave to plead the following several matters:—First, a traverse of the making of the bill; secondly, no notice of dishonour; thirdly, as to the second and third counts, never indebted; and fourthly, as to £100, parcel &c., that, before the commencement of the action, the defendant indorsed and delivered to the plaintiffs a bill of exchange for £100, which the plaintiffs received in satisfaction of the said sum of £100. The defendant pleaded, with the other pleas, fourthly, “as to the said sum of £100, parcel of the monies in the second and third counts, that he the defendant, *for and on account* of the said sum of £100, indorsed and delivered to the plaintiffs a certain bill of exchange for £100, drawn by the defendant and accepted by one T. Jackson; and the plaintiffs took and received the said bill of exchange *for and on account* of the said sum, parcel” &c. Averment, “that the defendant had not due notice of the non-payment of the said bill of exchange, so taken by the plaintiffs, as in this plea mentioned.” The plaintiffs treated this plea as unauthorised by the rule to plead several matters, and signed judgment, which was set aside for irregularity by *Alderson*, B., at chambers, on the authority of *Holliday v. Bohn* (a). The above rule having been obtained,

A defendant obtained a rule to plead, with other pleas, “as to the sum of £100, parcel &c., that the defendant indorsed and delivered to the plaintiffs a bill of exchange for £100, which the plaintiffs received in satisfaction of the said sum of £100.” The plea delivered was, “as to the sum of £100, parcel &c., the defendant, *for and on account* of the said sum of £100, indorsed and delivered to the plaintiffs a bill of exchange for £100, drawn by the defendant and accepted by T., and the plaintiffs took and received the said bill *for and on account* of the said sum; and that the defendant had not due notice of the non-payment of the said bill:”—*Held*, that the plea was not authorised by the rule to plead, and that the plaintiffs were entitled to sign judgment.

the plaintiffs were entitled to sign judgment.

(a) 3 Man. & G. 115; 3 Scott, N. R. 496.

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Horn shewed cause.—The plaintiffs were not justified in signing judgment, by reason of a slight variance between the plea and abstract. The plea is in substance the same as that allowed; for, though it alleges that the bill was received “for and on account” of the £100, it goes on to shew that the plaintiffs, by their laches, caused it to operate by way of satisfaction. Even if a variance exists, it would not entitle the plaintiffs to sign judgment. [*Parke, B.*—In what way could they take advantage of the objection?] Either by an order to strike out that plea, or to set aside the pleas altogether. It is different from the case of a defendant, who, being under terms of pleading issuably, pleads a non-issuable plea, for that is a clear violation of his compact, and, moreover, tends to delay and embarrass the plaintiff. *Holliday v. Bohn* (a) is in point. That was an action of debt on a promissory note and on an account stated; and the defendant having obtained a rule to plead two pleas to part of the demand, and nunquam indebitatus to the residue, by mistake pleaded non assumpsit to such residue with the other pleas; and the plaintiff having signed judgment generally, the Court set it aside, saying, “that the case differed from that of a defendant who delivers several pleas, without having obtained a rule to plead several matters, in which case the plaintiff may properly sign judgment.” [*Parke, B.*—In a note to that case, my Brother *Manning* observes, that the proper course would have been to have signed judgment on the last count. In *Griffiths v. Eyles* (b), *Eyre, C. J.*, seems to intimate, that, where two pleas are pleaded without leave of the Court, the plaintiff may apply to strike out one of them. Here there is no rule to plead these several matters.] [He then cited *Badman v. Pugh* (c) and *Baily v. Baker* (d).]

(a) 3 M. & G. 115; 3 Scott,
 N. R. 496.

(b) 1 B. & P. 415.

(c) 6 Scott, N. R. 150.

(d) 9 M. & W. 769.

Bramwell appeared to support the rule, but was not called upon.

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PER CURIAM (*a*).—The rule must be absolute.

(*a*) *Pollock*, C. B., *Parke*, B., *Rolfe*, B., and *Platt*, B.

WINTERBOTTOM v. LEES.

May 6.

MARTIN had obtained a rule calling on the plaintiff to shew cause why the issue, notice of trial, *Nisi Prius* record, and the trial of this cause, should not be set aside, with costs. The action was by payee against maker of a promissory note; and on the 20th March, the defendant, who was under terms of rejoining gratis and taking short notice of trial, such as the plaintiff could give, for the next Chester Assizes, pleaded (with other pleas) a set-off. On the 25th of March the plaintiff delivered a replication of the Statute of Limitations, and demanded a rejoinder. Shortly before nine o'clock in the evening of the 29th of March, the defendant delivered a rejoinder, "that the said debts and causes of set-off in the said last plea mentioned did arise and accrue within six years next before the commencement of this suit, modo et formâ." The 29th of March was the commission-day at Chester, and, by the practice of the office, records must be passed before three o'clock on the commission-day, at which hour the office closes. The plaintiff, without waiting for the delivery of the defendant's rejoinder, on the morning of the 29th of March, in form but similar in substance to the defendant's, made up the issue, and passed the record. The defendant did not appear at the trial, and the plaintiff having obtained a verdict, the Court set aside the issue, *Nisi Prius* record, and trial.

"Rejoining gratis," means rejoining within four days without a rule for that purpose, and not rejoining within twenty-four hours after demand.

On the 20th March, a defendant, under terms of rejoining gratis, and taking short notice of trial for the next assizes, pleaded a set-off. On the 25th March the plaintiff delivered a replication of the Statute of Limitations, and demanded a rejoinder. In the evening of the 29th March, which was the commission-day, the defendant delivered a rejoinder, but, in consequence of the office closing at three o'clock, the plaintiff inserted a rejoinder different in

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serted a rejoinder for the defendant, made up the issue, and passed the record. The rejoinder inserted by the plaintiff was, "that the said causes of set-off and every part thereof did arise and accrue to the defendant within six years next before the commencement of this suit, modo et formâ." Notice of trial was served on the defendant, but he did not appear, and a verdict was found for the plaintiff. The present rule was obtained on the grounds, that the rejoinder on the record differed from that delivered by the defendant, and that the record had in fact been passed by the plaintiff before issue joined.

Welsby and Hoggins shewed cause.—There is no material variance between the two rejoinders. The mere fact of the plaintiff having inserted a rejoinder for the defendant is not a ground for setting aside the proceedings, there being no difference in the issue imposed on the defendant, and the plaintiff being regular in other respects. The defendant was under terms of rejoining gratis, and taking such short notice of trial for those assizes as the plaintiff could give, which terms impliedly authorised the latter to do what was necessary for completing the issue, and passing the record before the office closed. In *Lush's Practice* (a), it is said that rejoining gratis means "rejoining without the usual four-day rule, and within twenty-four hours after demand." [*Rolfe*, B.—That is not so; *Adkins v. Anderson* (b) shews that rejoining gratis means, rejoining without a rule for that purpose, and that the defendant has still four days to rejoin. *Parke*, B.—The rule is stated in similar terms by Mr. Tidd, in his *Practice* (c). It ought to have been made a stipulation that the defendant should rejoin *instanter*.] A plaintiff may make up the issue and pass the record by anticipation, if he does it correctly. [*Rolfe*, B.—What the

(a) Page 396.

(b) 10 M. & W. 12.

(c) Page 472.

plaintiff passed was not the record.] The proper issues were raised. [*Parke, B.*—It was not a transcript of the record. The plaintiff represents to the officer of the court that there is a complete issue, whereas that is not so. The only way of getting over the difficulty would be by shewing that the defendant was under such terms, as either expressly or by implication authorised the plaintiff to do what he has done.]

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Martin appeared to support the rule, but was not called upon.

PER CURIAM (*a*).—The rule must be absolute.

(*a*) *Pollock, C. B., Parke, B., Rolfe, B., and Platt, B.*



In the Matter of an Arbitration between JOHN SMITH and JAMES WILSON. May 9.

THIS was an application to set aside an award. By agreement in writing between Smith and Wilson, certain disputes and differences were referred to arbitration; "the costs of and attending the submission of the said reference, and of the arbitrator and of his award, and of making this submission a rule of a court of record, to be in the discretion of the arbitrator." The arbitrator awarded, as to the costs, as follows:—"I further award, &c., that the costs of and attending the submission, and of the said reference, and charges of me the said arbitrator, and of this my award, By agreement in writing, certain disputes were referred to arbitration, "the costs of the submission, reference, award, and of making the submission a rule of court, to be in the discretion of the arbitrators." The arbitrators awarded that the costs of the submission, re-ference, and award should be borne by the parties in equal proportions; and that the costs of making the submission a rule of court should be paid by such of the parties through whose default, in the performance of the award, the same should become necessary:—*Held*, that the award was not final or certain as to the costs of making the submission a rule of court, and therefore bad.

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shall be borne and paid by J. Smith and J. Wilson, in equal proportions; but that the whole of such costs shall, in the first instance, be paid by such of the parties in difference as shall take up this my award, who shall, on demand, be repaid or reimbursed a moiety thereof by the other of the said parties. And I do lastly award, &c., that the costs of making the said submission a rule of any court of record shall be borne and paid by such of the said parties in difference through whose default in the performance of this award the same shall become necessary." On the 8th January, 1848, the submission was made a rule of this court, at the instance of J. Smith.

The present rule was obtained, on the ground (amongst others) that the award was not final or certain as to the costs of making the submission a rule of court.

Cowling shewed cause.—The award is in substance sufficient. It is true that the arbitrator does not, in express terms, decide which of the parties is to pay the costs of making the submission a rule of court, but it is left to the Court to ascertain by whose default the costs were incurred. That is not more uncertain than an award of costs, the amount of which is to be found by the Master. At all events, that part of the award may be rejected; because the arbitrator is not bound absolutely to award these costs, but only in his discretion, and a defective award is equivalent to no mention of them. This case is distinguishable from *Morgan v. Smith* (a); for there the arbitrator was bound by the terms of the submission to ascertain the costs.

Crompton, in support of the rule, argued that, as the arbitrator had chosen to exercise his discretion in respect

(a) 9 M & W. 427.

of these costs, he was bound to make his award certain and final.

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POLLOCK, C. B.—The Court (*a*) has reluctantly come to the conclusion, that the award must be set aside on that ground.

Rule absolute.

(*a*) Pollock, C. B., Parkes, B., Rolfe, B., and Platt, B.

JONES v. BROWN.

May 9.

THIS was a rule calling on the plaintiff to shew cause why a suggestion should not be entered on the roll to deprive him of costs. The plaintiff was an attorney residing in London, and the action was brought by him as indorsee of a bill of exchange for 18*l.* 3*s.*, accepted by the defendant. A verdict having been found for that amount, the present rule was obtained upon affidavit that the cause of action arose within the jurisdiction of a county court established by 9 & 10 Vict. c. 95.

The County Courts Act, 9 & 10 Vict. c. 95, has not deprived attorneys of their privilege of suing in the superior courts.

G. Pollock shewed cause.—The question is, whether the Small Debts Act, 9 & 10 Vict. c. 95, has deprived an attorney, who is plaintiff, of his privilege of suing in the superior courts at Westminster. The point has arisen in the Court of Queen's Bench, in the case of *Lewis v. Hance* (*b*), where it was decided that an attorney is not bound to sue in the county court, though he is liable, like any other person, to be sued there. The 67th section enacts, "that no privilege, except as hereinafter excepted, shall

(*b*) 5 Dowl. & L. 641.

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be allowed to any person to exempt him from the jurisdiction of any court holden under this act." By the 128th section it is enacted, "that all actions and proceedings which, before the passing of this act, might have been brought in any of her Majesty's superior courts of record, where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the Court within which the defendant dwells or carries on his business at the time of the action brought, or where any officer of the county court shall be a party, except in respect to any claim to any goods and chattels taken in execution of the process of the Court, or the proceeds or value thereof, may be brought and determined in any such superior court, at the election of the party suing or proceeding, as if this act had not passed." The 129th section enacts, "that if any action shall be commenced after the passing of this act, in any of her Majesty's superior courts of record, for any cause other than those lastly hereinbefore specified, for which a plaint might have been entered in any court holden under this act, and a verdict shall be found for the plaintiff for a sum less than twenty pounds if the said action is founded on contract, or less than five pounds if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs," &c. The 67th section applies only to defendants, and does not include the case of a *plaintiff*, who in no sense can be considered as "exempt from the jurisdiction" of a court; for it depends upon himself whether or not he will come within it. *Board v. Parker* (a) is in point. That was an application to enter a suggestion under the London Court of Requests Act, 39 & 40 Geo. 3, c. 104, s. 10, which enacts, "that no privilege shall be allowed to exempt any person from the jurisdiction of the said Court on account of his being an attor-

(a) 7 East, 47.

ney; but that all attorneys, &c. shall be subject to the several processes, orders, judgments, and executions of the said Court, in the same manner as any other persons," &c.; and it was held, upon the true construction of that statute, that an attorney plaintiff was not compelled to sue in the inferior court. After the passing of the Uniformity of Process Act, 2 Will. 4, c. 39, it was considered that an attorney's privilege of suing in the superior courts was taken away; the Courts, however, decided, that, although the attachment of privilege was abolished, the privilege itself remained: *Dyer v. Levy* (a), *Wright v. Taylor* (b). In *Armington's case* (c), "a clerk of the King's Bench was sued in an inferior court for a sum under five pounds, since the statute 21 Jac. 1, and by Jones and Chief Justice, 'A writ of privilege shall be allowed; for the statute is not intended to oust the clerks of this court of their privilege, being general;' and accordingly it was ruled." An attorney defendant was not subject to the jurisdiction of the Middlesex County Court Act, 23 Geo. 2, c. 33: *Gardner v. Jessop* (d), *Wiltshire v. Lloyd* (e). And where the plaintiff was an attorney, the defendant was not entitled to the benefit of that act, though resident within the jurisdiction of the county court: *Hussey v. Jordan* (f). [*Parke, B.*—The case of *Lewis v. Hance* is precisely in point.]

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The Court then called on

Pearson to support the rule.—The legislature intended, by the County Courts Act, to abolish all privilege of suing in a particular court. The Court will not consider itself bound by the case of *Lewis v. Hance*, seeing that there are no means of reviewing that decision in a

(a) 4 Dowl. P. C. 630.

(b) 1 M. & W. 144.

(c) Palm. 403.

(d) 2 Wils. 42.

(e) 1 Doug. 380 a.

(f) 1 Doug. 382, n.

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court of error. The words, "exempt from the jurisdiction of the Court," in the 67th section, may mean "exempt from the jurisdiction of the Court as to costs." [*Parke, B.*—If the inferior Court had any jurisdiction over the costs, there might be some weight in your argument; but it is the superior Court which deprives a party of costs.] The 129th section contains no exception: the words are, "if *any* action shall be commenced," &c. It will be a great evil if attornies are not compelled to sue in the county courts; for they will then be enabled to buy up small bills of exchange, and sue upon them in the superior courts, for the mere purpose of costs. The legislature could never have intended to preserve a privilege so open to abuse.

POLLOCK, C. B.—There has been a long current of authorities shewing that this privilege is not taken away by the particular words which are found in this statute. It is by no means an inconvenient mode of construing statutes, to presume that the legislature was aware of the state of the law at the time they passed. If, then, the law was, that by the use of such and such words the privilege in question was not taken away, and the legislature passes an act in which similar language is used, why are we to presume that they intended more by the new statute than the old? Before we can decide in favour of the defendant, we must overrule a long current of authorities. The rule will be discharged, with costs.

Rule discharged, with costs.

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In re LENAGHAN.

May 6 & 10.

ROBINSON v. LENAGHAN.

THIS was a rule calling on the judge of the Clerkenwell County Court, and Robinson, the plaintiff, to shew cause why a writ of prohibition should not issue prohibiting the said Court from proceeding further in the said cause, and why the sum of 6*l.* 10*s.* 11*d.*, paid by the defendant as debt and costs under protest, should not be returned to him.

It appeared from the affidavits, that, in the afternoon of the 13th of January, the defendant, on returning to his residence at No. 8, Highbury Villas, Islington, found an officer in possession of his goods, under an execution from the Clerkenwell County Court. The defendant had never been served with any summons, nor had he notice of any proceedings whatever against him, until the execution in question was put in. A summons had been taken out, directed to him at No. 8, St. Paul's-terrace, where he had never resided, but which house was occupied by a person of the name of Brown. The officer, on calling with the summons, was told that the defendant did not reside there, and was not known at that place, but he persisted in leaving the summons. Subsequently, notice of the judgment and order for payment were left at Brown's house, notwithstanding he refused to receive them. The execution issued upon affidavit of due service of the summons, by leaving it at the dwelling-house of the defendant. On the 14th January the defendant applied to the judge of the county court to set aside the proceedings on affidavit of the above facts, whereupon the following order was made:—
“It is ordered, that, on the defendant's undertaking to appear and defend this case on the merits, and also undertaking to bring no action against the plaintiff, or any officer of the court, the judgment be set aside; and in default of giving such undertaking on Saturday next, it is ordered

A summons in a plaint in a county court, under the 9 & 10 Vict. c. 95, having been served at a wrong place, the defendant had no knowledge of the proceedings until his goods were taken in execution. Before judgment, proof was given, to the satisfaction of the judge, that the summons had been served as required by the 80th section. The judge refused to set aside the proceedings, except on terms to which the defendant declined to accede:—*Held*, that the judge had jurisdiction over the matter, and that a prohibition would not lie.

Whether a prohibition lies under any circumstance to a county court after execution levied, *quære*.

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that the said judgment and execution be confirmed." The defendant refused to accede to these terms, and paid the debt and costs to the bailiff of the court, under protest.

Willes, in last Hilary Term, obtained the present rule, citing *Ferguson v. Mahon* (a).

J. Brown now shewed cause.—First, the application is too late. At common law, a prohibition could not issue after execution levied. *In re Poe* (b) was the case of an application for a prohibition to a court-martial after sentence ratified by the King, and carried into execution; and *Parke*, B., there says, "If we granted the writ under such circumstances, there would be no case, in which the party was still alive, where an application like the present might not be made to the Court. I, for one, should pause before I established such a precedent." *Hall v. Norwood* (c) is an express authority to shew that a prohibition cannot issue after judgment and execution. The decisions which may appear at variance with that doctrine are cases in which the sentence had a continuing operation, as *In re The Dean of York* (d).

Secondly, a prohibition will not lie; for the Court had an undoubted jurisdiction over the subject-matter, and has proceeded in due course of law. The 78th section of the 9 & 10 Vict. c. 95, enables the judges of the superior courts to make rules for regulating the practice of the county courts; and one of those rules allows process to be served by leaving it at the dwelling-house of the party. The 80th section enacts, "that if, on the day so named in the summons, or at any continuation or adjournment of the Court or cause in which the summons was issued, the defendant shall not appear, or sufficiently excuse his absence,

(a) 11 Ad. & E. 179.

(b) 5 B. & Ad. 681.

(c) 1 Sid. 165.

(d) 2 Q. B. 1.

or shall neglect to answer when called in court, the judge, upon due proof of service of the summons, may proceed to the hearing or trial of the cause on the part of the plaintiff only, and the judgment thereupon shall be as valid as if both parties had attended. Provided always, that the judge in any such case, at the same or any subsequent court, may set aside any judgment so given in the absence of the defendant, and the execution thereupon, and may grant a new trial of the cause upon such terms, if any, as to payment of costs, giving security for debts or costs, or such other terms as he may think fit, on sufficient cause shewn to him for that purpose." Even though the bailiff swore falsely as to the service of the summons, the judge was bound by the statute to give judgment for the plaintiff.

The Court then called on

Willes to support the rule.— The defendant had no notice whatever of the proceedings, and therefore the judgment of the inferior court is not binding upon him. It is a grave question, whether the legislature has made the judgments of these inferior courts as binding in all respects as those of the superior courts. [*Pollock*, C. B.—It would be highly inconvenient if the superior courts were to be made courts of appeal for mere matters of fact.] At common law, a party sued must actually have been brought into court; and it is submitted, that the notice now given is merely a waiver of the necessity of such appearance. *Ferguson v. Mahon* (a) decided, that, in an action of debt on a judgment in the Court of Common Pleas in Ireland, the defendant, though he cannot contest the merits of the action, or the propriety of the decision, may shew that the Court had not properly jurisdiction as to the defendant under the circumstances.

Secondly, the application is not too late. In the case of

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(a) 11 Ad. & Ell. 179.

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the *Dean of York*, the prohibition was held to be in time after the visitor had proceeded to sentence. It also appears, by Coke's Commentary on the "*Articuli Cleri*" (*a*), that a prohibition may properly be granted *after* execution. One of the objections there stated is as follows:—"As touching the time when prohibitions are granted, it seemeth strange to us that they are not only granted at the suit of the defendant, in the Ecclesiastical Court, after his answer, (whereby he affirmeth the jurisdiction of the said Court, and submitteth himself unto the same), but also after allegations and proofs made on both sides, when the cause is fully instructed and furnished for sentence; yea, after sentence, yea, after two or three sentences given, and after execution of the said sentence or sentences, and when the party, for this long-continued disobedience, is laid in prison upon the writ of *excommunicato capiendo*." To which was given the following answer:—"Prohibitions by law are to be granted at any time to restrain a court to intermeddle with or execute anything, which by law they ought not to hold plea of, and they are much mistaken that maintain the contrary And the king's courts that may award prohibitions, being informed either by the parties themselves or by any stranger, that any court, temporal or ecclesiastical, doth hold plea of that (whereof they have not jurisdiction), may lawfully prohibit the same, as well after judgment and execution as before." The same law is stated by Fitzherbert in his *Natura Brevium* (*b*). [*Parke, B.*—It is not so much a question whether or not the defendant's application is in time, as whether the judge had not jurisdiction under the 80th section of the act. But for that section, we might have power to interfere.] [He also referred to *Buggin v. Bennett* (*c*), and *Roberts v. Humby* (*d*), in support of the latter point.]

(*a*) 2 Inst. 601, 602.

(*b*) Page 46 a.

(*c*) 4 Burr. 2037.

(*d*) 3 M. & W. 120.

POLLOCK, C. B.—I entertain no doubt, in the present case, that the rule ought to be discharged. Upon looking at the different clauses of this act of Parliament, the natural and plain construction of them is, that the County Court shall have jurisdiction wherever due proof is given to the judge of the service of process. The words, in the 80th section, “the judge, upon *due proof* of the service of the summons,” do not require to be understood as meaning that such service has been “*absolutely* proved,” but that there has been such proof as satisfied the mind of the judge that service of the process has been made. When he is so satisfied, he has jurisdiction; and, by the provisions of the statute, our right to interfere is at an end.

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PARKE, B.—I am of the same opinion. The legislature has put the judgment of the county courts upon the same footing as those of the superior courts. A person may make an application to the judge of the County Court to set the judgment aside; but if he does not do so, the judgment is valid.

ROLFE, B.—I am of the same opinion. Mr. *Willes* reads the 80th section as if the words had been “on service of the summons and due proof made thereof;” and not as they really are, “upon due proof of the service of the summons.”

PLATT, B.—The act leaves the proof of the service to the discretion of the judge; and if he is satisfied with the proof he has jurisdiction. The case stated in the *Natura Brevium* is very distinguishable from the present; for in that case there was something *to be done* which might ultimately produce fruits by execution; but here the money has already been paid, and may have found its way into the hands of the plaintiff.

Rule discharged.

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May 11.

SANSON v. PRICE.

A plaintiff having obtained a verdict for 30*s.* in an action for money paid, a rule was made absolute to enter on the roll a suggestion that the defendant resided within the jurisdiction of the Middlesex County Court, and "that the plaintiff pay the defendant his costs of suit, pursuant to the 23 Geo. 2, c. 33, and 5 & 6 Vict. c. 97:"—*Held*, that, as the defendant's right to the costs depended on the event of the trial of the suggestion, the Court had no power, by rule, to order the plaintiff to pay them.

THIS was a rule calling on the defendant to shew cause why the taxation of his costs should not be stayed until after the trial of an issue raised on the traverse of a suggestion.

The plaintiff having obtained a verdict for 30*s.* in an action for money paid, on the 24th November 1847 a rule was made absolute for entering on the roll a suggestion that the defendant was liable to be summoned to the Middlesex County Court, and "that *the plaintiff do pay the defendant his costs of suit*, pursuant to the stats. 23 Geo. 2, c. 33, and 5 & 6 Vict. c. 97." On the 12th January last, a suggestion was accordingly entered; and, on the 17th, the plaintiff traversed the suggestion; but the defendant had not replied to the traverse. On the 28th April the present rule was obtained.

T. Jones shewed cause, and submitted that the application came too late. There was no error in the rule; and whilst it remained in force, the Court could not stay the taxation.

The Court then called on

Lush to support the rule.—If the taxation be not stayed, the plaintiff will have to pay costs, although he may ultimately succeed upon the trial of the issue raised on the suggestion. The order to pay costs is a term which the Court has no power to enforce, because they cannot deprive the plaintiff of his right to traverse the suggestion. The costs are part of the judgment on the suggestion; and it is only upon the record that the defendant becomes entitled to them. The Court can no more impose upon the plain-

tiff the term of paying costs, than they can, by rule, order a defendant to pay the amount of a verdict found against him. The term was introduced into rules of this description before the case of *Watson v. Quilter* (a), which decided that a plaintiff might traverse the suggestion; but since that case, it ought not to have been inserted. If the suggestion remains untraversed, the defendant has his remedy by execution. [*Parke, B.*—The statute (b) says, that no costs shall be awarded to the plaintiff, but that the defendant shall recover them; that is, by the record. This term ought not to have been introduced into the rule.]

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T. Jones.—It is incorrect to say that the Court can in no case impose this term; they may clearly do so, if it be evident that the defendant must succeed on the suggestion. This is an attempt to re-open a rule after the interval of a term, which is contrary to the established practice: *Todd v. Jeffrey* (c). If the plaintiff could have shewn any ground for inducing the Court to believe that the cause of action did not arise in Middlesex, or that he would be successful on a traverse of the suggestion, the rule for entering it would not have been made absolute. But he has wholly failed to do so, and now he seeks to alter its terms. [*Platt, B.*—He says that part of the rule should be struck out quia improvide emanavit.]

PARKE, B.—There is a contradictory state of things which ought not to be allowed to remain. On the record, there is a traverse of the suggestion, and there is a rule of court ordering the plaintiff to pay costs. The Court had no power to make such an order, and the taxation of costs must be suspended until after the trial of the issue on the suggestion. The present rule should, therefore, be absolute

(a) 11 M. & W. 760.

(b) 23 Geo. 2, c. 33, s. 19.

(c) 7 Ad. & Ell. 519; 2 N. & P. 443.

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to amend the former rule, upon payment of costs, by striking out the part objected to.

POLLOCK, C. B., ROLFE, B., and PLATT, B., concurred.

Rule accordingly.

May 11.

HAWKINS v. WILKINSON.

A defendant served two consecutive summonses for leave to plead several matters, neither of which was attended by the plaintiff. On the return of the second summons, on which day the defendant's time for pleading expired, he took out and served a third summons, returnable the following day. The plaintiff did not attend this summons, but signed judgment after it was returnable:—*Held*, that the third summons was no stay of proceedings, and that the judgment was regular.

THIS was a rule calling on the defendant to shew cause why an order of *Pollock*, C. B., setting aside a judgment signed by the plaintiff in this case, should not be rescinded. It appeared that, on the 8th of February, the defendant's attorney duly served a summons to plead several matters, returnable the following day. No one attended on behalf of the plaintiff, and on the 9th a second summons was served, returnable on the 10th, on which day the defendant's time for pleading expired. This summons being called on in its turn, and no one appearing on behalf of the plaintiff, the defendant's attorney made an affidavit of the service and attendance, and left it with the judge's clerk for the purpose of being signed by the judge. The judge, however, left chambers without signing the affidavit, whereupon the judge's clerk suggested that a third summons should be taken out, returnable on the 11th, which was accordingly done and duly served. No one attended this summons on behalf of the plaintiff, and the judge, upon affidavit of the service and attendance, made the order to plead several matters, and the pleas were delivered the same evening. The defendant afterwards found that the plaintiff had signed judgment on the 11th, after the hour when the third summons was returnable.

Archbold shewed cause.—The order setting aside the

judgment is correct. A summons is a stay of proceedings from the time it is returnable; and there is no difference in that respect between a third and a second summons. [*Rolfe*, B.—After a second summons, the party has the remedy in his own hands; and therefore there is no need of a stay of proceedings.] Formerly there must have been three summonses, and an affidavit of attendance thereon, before a judge would make an order *ex parte* (a). The alteration in the practice is an indulgence to the party, which he may waive. [*Parke*, B.—As the defendant did not avail himself of his remedy, the other side might reasonably suppose that he did not intend to pursue that course.] A party who is compelled to take out a third summons has the same privilege as before. [*Platt*, B.—Suppose the defendant had taken out a fourth or a fifth summons, would that be a stay of proceedings? It is difficult to see what limit there is. *Parke*, B.—The defendant should have taken care that the affidavit and order were made on the day the second summons was returnable.]

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Lush appeared to support the rule, but was not called upon.

Per CURIAM (b).—The judgment being regular, the rule must be absolute for setting aside the judge's order; but the defendant may have liberty to set aside the judgment on payment of costs.

Rule accordingly.

(a) 1 Tidd. Prac. 511.

(b) *Pollock*, C. B., *Parke*, B., *Rolfe*, B., and *Platt*, B.

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May 11.

TATTERSALL v. PARKINSON.

A cause and all matters in difference between the parties were referred to two arbitrators and an umpire: the costs of the cause to abide the result. The umpire awarded that all further proceedings in the cause should thenceforth cease and be no further prosecuted, and that the plaintiff should pay to the defendant 12s. 0½d., found to be due to him. A demand was made of 21l. 16s. 2d., being the costs in the cause, but not of the 12s. 0½d. A rule having been obtained, calling on the plaintiff to shew cause why he should not pay the defendant both those sums, the Court, considering the validity of the award doubtful, refused to make the rule absolute even as to the sum demanded.

THIS was a rule calling on the plaintiff to shew cause why he should not pay to the defendant the sums of 21l. 16s. 2d. and 12s. 0½d., pursuant to an award.

It appeared from the affidavits, that an action was brought by the plaintiff against the defendant, in which several issues were raised; and that, by a judge's order, all matters in difference between the parties were referred to two arbitrators, with power to appoint an umpire: the costs of the cause to abide the result, and the costs of the reference and award to be in the discretion of the arbitrators. The umpire awarded, "that all further proceedings in the said cause shall henceforth cease, and be no further prosecuted;" that the plaintiff should, on a certain day, "pay to the defendant 12s. 0½d., being the amount found due to him, and that, upon payment thereof, the defendant should deliver to the plaintiff the four ash-pans mentioned in the particulars of the matters in difference;" and "that each of them, the plaintiff and defendant, should bear and pay his own costs of the reference, and that the costs of the award should be borne and paid by them in equal moieties." A personal demand of the sum of 21l. 16s. 2d., being the costs in the cause, had been made upon the plaintiff, and payment refused; but no demand had been made of the sum of 12s. 0½d.

Pashley shewed cause.—First, the award is bad upon the face of it. The costs of the cause are to abide the result; but there is no result in favour of either party: the umpire only awards that all proceedings in the cause shall thenceforth cease. Where a replevin suit was referred to arbitration, the costs of the suit to abide the event, and the arbitrators awarded that the plaintiff should pay to the defendant 6l., and that the action should be no further prosecuted,

it was held, that the award did not shew who ought to pay the costs, and consequently was not final: *In re Leeming and Fearnley* (a). The Court there say, that "it must appear by the award that the action is finally determined in favour of one of the parties, or else it cannot be ascertained how the costs are to go." *Blanchard v. Lilly* (b) is distinguishable; for there the arbitrator awarded that certain actions be discontinued, and that each party pay his own costs, which was, in effect, an award of a stet processes.—Secondly, there has been no demand of the sum of 12s. 0½d.; and the authorities shew that, in a case of this kind, a demand is equally necessary as on a motion for an attachment: *Richards v. Patterson* (c), *Winwood v. Hoult* (d).

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Hugh Hill, contra.—First, the rule may be absolute, at least as to the 21l. 16s. 2d., which sum has been demanded. [*Parke*, B.—You do not release the 12s. 0½d.] It may be made part of the rule, that the claim to the 12s. 0½d. has been abandoned. [*Parke*, B.—You cannot have a rule absolute in this case, unless you could have an attachment. The defendant ought not to make this application as it were piecemeal.]—Secondly, the award is sufficient. The costs are to abide the *result*, not the *event*. It is clear that nothing is due to the plaintiff; therefore the decision in the action is against him. In addition to that, he is ordered to pay the defendant the sum of 12s. 0½d. found due to the latter. [*Rolfe*, B.—If the defendant were indebted to the plaintiff in 20l., and the plaintiff indebted to the defendant in 20l. 12s. 0½d., then the award would be correct.] Every intendment will be made in favour of the award; and, in the view suggested, it is perfectly correct.

(a) 5 B. & Ad. 403.
(b) 9 East, 497.

(c) 8 M. & W. 313.
(d) 14 M. & W. 197.

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POLLOCK, C. B.—I do not come to that conclusion with sufficient certainty to induce me to think that we ought to exercise the extraordinary power of the Court in enforcing the award. The rule must be discharged with costs.

PARKE, B., and ROLFE, B., concurred.

Rule discharged with costs.

May 11 & 26.

FAVIELL v. THE EASTERN COUNTIES RAILWAY
 COMPANY.

A writ having issued in an action of debt against an incorporated railway company, the defendants' attorney consented to a judge's order referring to arbitration "the claims of the plaintiff in the action." The plaintiff claimed, before the arbitrator, a sum for extra work occasioned by the

MARTIN moved for a rule calling on the plaintiff to shew cause why the award made in this cause should not be set aside. In the year 1841, the plaintiff entered into a contract under seal with the Eastern Counties Railway Company for the construction of certain portions of their line at a stipulated price, and according to certain drawings, plans, and specifications. The deed contained a clause that the plaintiff should not be entitled to charge for any alteration or addition, unless made under the sanction of a note in writing signed by two of the directors of the Company. The deed also contained a covenant by the Company to deliver possession of certain land to the plaintiff within a specified

defendants' breach of covenant in not giving the plaintiff possession of certain land at a stipulated time. The arbitrator entertained this claim, though objected to, and awarded the plaintiff a sum in respect of it. The Court having refused to set aside the award—*Held*, (on motion to enforce it under the 1 & 2 Vict. c. 110), first, that if the matter in dispute were not within the jurisdiction of the arbitrator, the defendants should have applied to the Court to revoke the submission; but not having done so, and the plaintiff having set up this matter as "a claim in the action," and the arbitrator having so decided in respect of it, his award was binding, however erroneous.

Secondly, that the submission was valid, though the attorney had no authority, under seal, to defend or refer the cause.

time, for the purpose of executing his contract. A portion of the work consisted of an extensive embankment, which the nature of the soil rendered difficult and expensive to construct, and which, as the plaintiff alleged, was rendered the more so by reason of the defendants' having failed to put him in possession of the land at the stipulated time. The plaintiff proceeded with the work, and sent in a claim of 10,307*l.* 0*s.* 1*d.* for extra expenses incurred by him in the execution of his contract, by being, as he alleged, delayed by the Company in getting possession of the land. This claim having been disallowed, the plaintiff brought the present action of debt for work and labour, to recover that sum, together with a portion of the stipulated price, amounting in the whole to about 15,000*l.* The writ was tendered to the defendants' attorney, who thereupon consented to refer the matter to a legal arbitrator, and a judge's order was drawn up, by which "the claims of the plaintiff in this action, and the set-off of the defendants' therein," were alone referred. It was urged before the arbitrator, that the plaintiff was not entitled to recover in this action of debt the amount of the extra work occasioned by the non-delivery of the land, and that his only remedy was by action for damages for the breach of covenant. The arbitrator, however, received evidence of the extra work, and awarded "that the plaintiff was entitled to recover, in respect of his said claim, the sum of 14,410*l.* 0*s.* 7*d.*, and that the defendants were entitled, in respect of their set-off in the said action, to the sum of 1820*l.* 11*s.*, and that the plaintiff was entitled to recover the balance, the sum of 12,589*l.* 9*s.* 7*d.*" The defendants' attorney deposed, that he had no authority under the seal of the Company to sign the consent to the reference, but was only verbally authorised by the chairman of the directors, and that he had no warrant to defend made out or executed in any way, and that there was no entry of record ever made in respect of any such warrant.

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Martin.—The arbitrator has exceeded his jurisdiction. The submission was solely of claims in an action of debt; but the arbitrator has awarded the plaintiff the extra expenses, which could only be recovered as damages in an action of covenant. [*Pollock*, C. B.—The arbitrator may have made a mistake in point of law; but that is no ground for setting aside the award. *Parke*, B.—If the arbitrator had found in terms that the plaintiff was entitled to so much damages, the award would have been void as to that. The question here was, whether the sum claimed for extra work was a *debt*, and the arbitrator finds it was.] The arbitrator's attention was called to the nature of the claim, and he persisted in receiving the evidence. [*Pollock*, C. B.—Then you might have applied to the Court or a judge to revoke the submission.] A reference of all debts does not give the arbitrator any jurisdiction over damages. [*Parke*, B.—It is simply the case of an erroneous decision; and if parties choose to refer a matter to a judge of their own selection, they are bound by his decision, both in fact and law. The fallacy lies in assuming that the arbitrator has exceeded his jurisdiction.]

Martin then moved to set aside the order of reference.—The Company, being a corporation, could not become parties to a reference, except by a submission under their common seal. An order of reference is a mere agreement between the parties, sanctioned by a judge, and only differs from an ordinary agreement inasmuch as it may be made a rule of court, and its performance enforced in a more summary way than by action. [*Pollock*, C. B.—The same objection would apply to an order of *Nisi Prius*; so that, according to your argument, a corporation could never refer a case after the jury were sworn. *Parke*, B.—By usage, an attorney may refer a case in which he is employed as attorney.] Here there is a further objection, that the attorney himself was not appointed under seal. [*Pollock*, C. B.—If you are right, you do not want our assistance.

In any attempt to enforce the award, you can defend yourself on these grounds. If we were to set aside the award, we should deprive the plaintiff of the opportunity of having the matter settled by a court of error.]

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Rules refused.

Knowles, for the plaintiff, obtained a rule under the 1 & 2 Vict. c. 110, calling on the defendants to shew cause why they should not pay to the plaintiff 12,589*l.* 9*s.* 7*d.*, the sum awarded to him.

Martin, Willes, and *Prentice* shewed cause in Trinity Term (May 26).—The Court will not enforce the award in a summary manner, but will allow the defendants an opportunity of raising the objection by plea. An arbitrator cannot give himself jurisdiction by improperly deciding upon a matter not submitted to him. In that respect, there is no difference between an arbitrator and an inferior court: *Roberts v. Humby* (a). It is conceded, that if an arbitrator makes a wrong decision in point of fact, upon a matter within his jurisdiction, such decision is final and conclusive; but the objection here is, that the arbitrator has determined a matter to be within his jurisdiction which the parties never submitted to him. In *Viner's Abr.*, tit. "Arbitrement," (D.) 6, 7, it is said, "If a submission be of all actions personal, *sectis et querelis*, the arbitrator cannot make an award of any suit, action, or quarrel which is real, but only of such which are personal; for the word 'personal' refers to all which comes after in the copulative; but if the submission had been of all actions personal, *ac sectis et querelis*, the arbitrator might have made an award of real things; for the word 'ac' disjoins them." So here, the submission being of matters of debt alone, the arbitrator had no power to decide upon a claim

(a) 3 M. & W. 120.

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which formed the subject of unliquidated damage: *Macintosh v. The Midland Counties Railway* (a). The excess of jurisdiction may be shewn by plea: *Mitchell v. Staveley* (b); *King v. Bowen* (c); and the defendants ought to have the opportunity of doing so. On the same principle, the Court of Queen's Bench quashes a conviction where justices have acted without jurisdiction, or grants a mandamus where they have erroneously decided that they have no jurisdiction. Besides, this proceeding is a substitute for the remedy by attachment, and is governed by the same rules, and no attachment can be granted against a corporation.

Secondly, there was no valid submission. Prior to the rules of Hilary Term, 4 Will. 4, ss. 4, 15, warrants of attorney to sue or defend must have been entered of record. A corporation cannot appear to an action, except by warrant of attorney, under the corporate seal: *Rez v. The City of Chester* (d). In Plowden, 91, it is expressly laid down, that a corporation "cannot appear by bailiff, without having a warrant in writing." This is the case of an unauthorised appearance by an attorney, and is distinguishable from *Bacon v. Du Barry* (e), inasmuch as there the attorney had himself executed the arbitration bond. *Filmer v. Delber* (f) is the only decision that an attorney may refer a cause against the express direction of his client; and it is contrary to all principle that an agent should have power to bind his principal by a contract which the latter has forbidden. [Platt, B.—As between attorney and client, you may be right; but surely an attorney, duly appointed, has authority to bind his client as to third persons. Alderson, B.—How is the other side to know whether the attorney has authority or not? In *Bayley v. Buckland* (g), the Court laid down the rule, that, where a

(a) 14 M. & W. 548.

(b) 16 East, 58.

(c) 8 M. & W. 625.

(d) 2 Show. 366; 1 Skin. 154.

(e) Carth. 412.

(f) 3 Taunt. 486.

(g) 1 Exch. 1.

defendant had notice of the action, and an attorney, without authority, appeared for him, the proceedings would not be set aside; otherwise, if the defendant had no notice. The principle of that case governs this.] *Biddell v. Dowse* (a) shews that a submission by an attorney, who appeared for an infant, is void. [*Alderson, B.*—In that case there was no consent by the infants, or any person representing them, for they could not appoint an attorney.]

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The *Attorney-General*, in support of the rule, called the attention of the Court to certain parts of the affidavits, by which it appeared that the sum in dispute was claimed by the plaintiff, in his particulars, as a debt due in the action. (He was then stopped by the Court). As to the second point, he argued that, the attorney having described himself in the affidavits as such, it must be taken that he was properly appointed, and that he had authority to bind the corporation by any act done by him in the conduct of the suit.

POLLOCK, C. B.—The only arguable point is, whether the arbitrator has exceeded his jurisdiction in awarding compensation to the plaintiff in respect of his claim for extra work. This is said to be a fit matter for the decision of the Court, upon the question being raised by plea. But the arbitrator has already decided that this claim is a debt. If, indeed, on a reference of all claims in an action of debt, the arbitrator were to entertain a claim for damages in an action of assault or criminal conversation, probably the Court, if the subject were brought before them, would not allow the reference to proceed; but upon the facts now before us the question is not whether the arbitrator has exceeded his jurisdiction, but whether he has decided the matter in dispute. The question before him was, whether

(a) 6 B. & C. 255.

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this claim for extra work was a claim in the action, or mere damages; the reference goes on, and the arbitrator comes to the conclusion that it is a claim in the action, and that the plaintiff is entitled to a certain sum in respect of it. Whether correctly or incorrectly, he has decided the matter, and his award is conclusive.

ALDERSON, B.—I am of the same opinion. I was at first struck by the argument, that the extent of the arbitrator's jurisdiction could not be interpreted by his own judgment, and I still think so. But here the arbitrator had a general jurisdiction over the matter, because the reference was of the plaintiff's "claims in the action," and the plaintiff claimed this amount of damage as a *debt*. He may be wrong in his view, and the arbitrator also wrong in taking it into consideration; but when the defendants saw the arbitrator entertaining a question which he ought not to entertain, it was their duty to interpose and apply to a judge, for the purpose of being allowed to revoke the submission, which, no doubt, would have been granted, had it appeared by affidavit that the arbitrator intended to exceed his jurisdiction. The question as to the construction of the submission would then have been raised before the judge; but, instead of doing that, the defendants, though they find the arbitrator going on, do not interpose, but make the question one for his determination, and he has determined it. The extent of the arbitrator's jurisdiction is to be taken according to the plain words of the submission, namely, of the "claims" which the plaintiff makes in the action, and this is one.

With respect to the other point, I concur in opinion with the Lord Chief Baron. Parties suing a corporation would be grievously injured if they were obliged in all cases to inquire whether the attorney for the corporation was authorised under seal.

ROLFE, B.—I am of the same opinion. Let us see what

was referred to the arbitrator. In the language of the affidavit, it is "the claims of the plaintiff in this action, and the set-off of the defendants therein." If, then, the sum in dispute was one of the plaintiff's claims in the action, the objection fails. It is clear, from the affidavits, that the plaintiff claimed a sum of 15,000*l.* for *debt*, which included this extra work; and after that, it is impossible to say it was not referred to the arbitrator to determine whether or no the claim in question was a debt. The arbitrator has decided that it could be established as a debt, and has awarded accordingly. I also concur as to the other point.

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PLATT, B.—I also think that the rule ought to be absolute. An attorney who has once appeared for a party has jurisdiction over the cause, and may refer it. If the attorney acted without authority, and the client is injured, he has a remedy by action against the attorney. Here the attorney having in fact appeared for the defendants, they are estopped from saying that he was not properly appointed, and having authority to appear, he had also authority to conduct the whole case.

With regard to the other point, when it comes to be understood, it is perfectly plain. The defendants in effect say, "I only refer this claim if you, the plaintiff, can establish it to be a *debt*." By the judgment of the arbitrator, the plaintiff did establish it to be a debt.

Rule absolute.

END OF EASTER TERM.

Exchequer Reports.

EASTER VACATION, 11 VICT.

1848.

May 15.

ALLEN v. SHARP.

An assessment under the Assessed-Tax Acts is final and conclusive, unless appealed against in the manner prescribed by the 43 Geo. 3, c. 99, s. 24. Therefore, where a party was assessed to the duty imposed on "horse-dealers,"—*Held*, that the decision of the assessor, that the party was a horse-dealer, however erroneous, could not be questioned in an action.

Quere, whether a person who for commission sells by auction or private contract the horses of

others, is a "horse-dealer" within the Assessed-Tax Acts.

Replevin lies in every case of an alleged wrongful taking of goods.

REPLEVIN of goods and chattels. Avowry, that, on the 5th of April, 1844, and from thence until and on, and to the end of the 5th of April, 1845, and from thence until the end of the 5th of April, 1846, and from thence until and at the said time when, &c., the plaintiff did, in the parish of St. Anne, in the district of St. Anne, &c., exercise and carry on the trade and business of a horse-dealer, and was, during all the times aforesaid respectively, an inhabitant of the said parish, within the district, &c., aforesaid; that, after the 5th of April, 1845, and before the 20th of June in the last-mentioned year, J. S. and E. W., then being the assessors duly appointed according to the several acts of Parliament passed for levying the several duties of assessed taxes, and relating thereto, and in all respects duly qualified to make the assessments hereinafter mentioned, and having theretofore and after their appointment, to wit, on &c., taken the oath required to be taken by such assessors, before they acted as such assessors, according to the said acts of Parliament, did make an assessment upon the several inhabitants of the parish of St. Anne, West-

minster, pursuant to the said acts, for the year ending the 5th of April, 1846, which said assessment was then, before the said 20th of June, to wit, on &c., duly, and according to the said acts of Parliament, certified upon oath by the said J. S. and E. W., to, and allowed, according to the directions of the said acts of Parliament, by J. R. and P. T., then being two of the commissioners for the affairs of taxes acting for the said district of St. Anne, according to the acts of Parliament, &c.; that, in and by the said assessment, he the plaintiff, as such inhabitant as aforesaid, and a person so exercising the said trade and business in the said parish, &c., was, by the said J. S. and E. W., then being such assessors as aforesaid, assessed in the sum of 25*l.*, as and for the duties of 22*l.* 10*s.* and 2*l.* 10*s.* payable by horse-dealers, under the 48 Geo. 3, and 52 Geo. 3, for, amongst other things, granting duties payable by persons who should use or exercise the trade and business of a horse-dealer within the cities of London and Westminster, &c.; and also in the further sum of 2*l.* 16*s.* 10*d.*, part whereof, to wit, 2*l.* 10*s.*, was the additional duty of 10*l.* per cent. upon the said sum of 25*l.*—that is to say, such additional duty of 10*l.* per cent. as was granted to our Lady the now Queen, by the statute passed in the third year of her reign, for granting to her said Majesty duties of customs, excise, and assessed taxes, and the residue of which said sum of 2*l.* 16*s.* 10*d.* was such additional duty of 10*l.* per cent. granted by the last-mentioned act upon and in addition to certain other duties, amounting to 3*l.* 8*s.* 9*d.*, in which the plaintiff was duly assessed in and by the said assessment, and to the payment of which, and to be so assessed as aforesaid, he the plaintiff was, according to the said several statutes relating to assessed taxes, liable.—The avowry then alleged the payment by the plaintiff of the said sums of 3*l.* 8*s.* 9*d.* and 6*s.* 10*d.*; the due appointment of the defendant, by the commissioners, as collector of the said duties; the delivery to him of a warrant by the commissioners,

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requiring him to distrain on nonpayment thereof; the demand by the defendant upon the plaintiff of the said duties of 25*l.* and 2*l.* 10*s.*; a refusal by the plaintiff to pay the same, and the taking of the goods and chattels in the declaration mentioned by the defendant as such collector, and by virtue of the said warrant, as and for a distress for the said sum of 27*l.* 10*s.* so in arrear: Verification.

Replication, *de injuria*.

At the trial of the cause, a verdict was found for the defendant, by consent, and subject to the opinion of the Court, on the following case.

The avowry was admitted by the plaintiff to be entirely true, except so far as relates to the plaintiff having used or exercised the trade and business of a horse-dealer, or being or having been liable to be assessed for the duty payable by horse-dealers, or persons using or exercising the trade or business of horse-dealers.

The duty was imposed under the provisions of the stat. 48 Geo. 3, c. 55, Sched. (H), and 52 Geo. 3, c. 93, Sched. (H), whereby it is made payable by every person who shall use or exercise the trade and business of a horse-dealer.

As to the plaintiff's liability to be so assessed, the following were the facts admitted at the trial, and on which the plaintiff contended that he was not liable:—

The plaintiff, during the time in respect of which the assessment was made, as hereinafter mentioned, viz. from the 5th of April, 1844, to the 5th of April, 1845, was the proprietor of Aldridge's Repository, in Upper St. Martin's-lane, in the parish of St. Anne, Westminster, and there carried on the business of selling horses and carriages, harness, and other things, for persons upon commission. The repository was open to all persons desirous of selling property of that description; and the general mode of selling was by public auction. These sales took place periodically, viz. once a week in the winter months, and twice in each week in the summer months; and the horses or carriages,

or other property, were generally sent into the plaintiff's premises a few days previously to the day on which they were to be sold. They were arranged in lots, and catalogues and particulars of sale were printed and distributed; and the property was then put up for sale by public auction by the plaintiff or his manager, upon the premises. If the same was sold, the plaintiff charged the seller a commission of 5*l.* per cent. upon the purchase-money, and also a further sum for the keep of the horses or standing of the carriages or other property until the time of sale. If the same was not sold, the plaintiff charged from 5*s.* to 7*s.* 6*d.* for putting it up by auction, and the keep or standing, as before stated. Where the property was put up for sale, but was not sold by public auction, the plaintiff occasionally sold it after the auction for the owner by private contract, and he then made the same charges as if it had been sold by auction. The number of horses sold by the plaintiff for other persons, between the 5th of April, 1844, and the 5th of April, 1845, otherwise than by public auction, was to that of the sales of public auction in the proportion of about three to one hundred.

The plaintiff also occasionally, but very rarely, received horses and carriages and other property from other persons for sale by private contract on their account, but not exceeding six instances in the course of any one year, and he then charged commission as upon a sale by auction, and the keep or standing if sold; and, if not sold, then only the keep or standing to the proprietors of such property. The business carried on by the plaintiff was simply selling horses and carriages and other property, in the way before described, for and as the property of other persons. He did not buy horses or carriages, or other property on his own account, in the way of trade or business. The plaintiff's principal business was selling horses and carriages by auction as before mentioned, but he also frequently sold by auction or commission for other persons, being the owners thereof, harness and stable

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utensils, and the stock of horse-dealers and people employing horses and carriages, and occasionally also leases of the premises on which the business of such persons had been carried on. The plaintiff also, on all his printed posting-bills and catalogues of sales, printed and issued the following notice:—"The public is respectfully requested to take notice, that the business of Aldridge's Repository is strictly confined to sales by auction and commission, there being no dealing on the part of the proprietor, nor by any person employed by him, to operate to the prejudice of either buyers or sellers; and that under no circumstances is the practice of misrepresenting the ownership of horses ever resorted to. The days of payment for the proceeds are on Saturdays and Mondays only, upon production of the printed receipt." The plaintiff also, several times in each week, caused advertisements to be inserted in the public daily newspapers to the same effect. The plaintiff, during all the time aforesaid, took out auctioneers' licenses, and paid the duty thereon, for himself and also for his manager, and exercised no other trade or business, as before mentioned.

The plaintiff having declined to pay the assessment, on the ground that he was not liable to the horse-dealers' duty, and having intimated his intention to raise the question of his liability, the seizure in question was made upon his goods, and he thereupon caused the goods to be replevied; and this action was commenced by the plaintiff, in order to raise the question of his liability to be so assessed as in the avowry set forth.

If the Court should be of opinion that the plaintiff was liable to be assessed to the horse-dealers' duty as aforesaid, or, that if not so liable, the avowry could still be supported, the verdict for the defendant was to stand. If the Court should be of a contrary opinion, the verdict was to be entered for the plaintiff, with 5*l.* damages. The Court to be at liberty to draw such inferences of facts as the jury would have drawn; and at the desire of either

party, the present case is to be converted into a special verdict, and the inference of facts found by the Court in that case to be stated as facts.

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Sir *F. Thesiger* (*Ogle* and *Bovill* with him) for the plaintiff.—First, it will be objected that, in the present case, the action of replevin cannot be maintained. That objection arises from confounding the act of the sheriff, in giving up the goods, with the action of replevin. Whether the sheriff was right or wrong in returning the goods, the plaintiff is equally well entitled to maintain replevin for their seizure, as he would be to maintain trover or detinue. An action of replevin may be commenced without any return of the goods. *George v. Chambers* (a) is a conclusive authority to shew that replevin will lie in this case. *Parke*, B., in his judgment there, says, “The question now to be decided is simply whether goods, taken under a *pretended* authority, can be replevied. *Primâ facie* there is no doubt they can; for, though in ordinary practice it is applied only to a distress for rent, yet a replevin is at common law a remedy applicable in all cases where goods are improperly taken.” [*Parke*, B.—You need not argue that point further.]

Secondly, the plaintiff was not liable to be assessed to the duty imposed on horse-dealers. He was neither a horse-dealer in fact, nor within the meaning of the statutes relating to assessed taxes. A “dealer” is one who “buys and sells for profit.” It is true that, in the case of *Rez v. Commissioners of Excise* (b), a *buyer* of foreign wine was held to be a dealer in it; but that decision proceeded on the particular language of the statute 26 Geo. 3, c. 59, s. 8, which was in the alternative that no person should “deal in or sell” foreign wine without a license. [*Alderson*, B.—The strict meaning of the word “deal” is to “distribute.” Does not the plaintiff distribute horses in the course of

(a) 11 M. & W. 149.

(b) 2 T. R. 381.

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traffic?]

The 24 Geo. 3, c. 31, after imposing certain duties, enables the commissioners to grant licenses to such persons who should apply for the same, "to use and exercise the trade and business of a horse-dealer." The 29 Geo. 3, c. 49, s. 5, recites that enactment, and restrains the commissioners from granting such license to any person, unless he shall produce a declaration in writing, signed by him, that he seeks his living by buying and selling horses, and in such declaration shall set forth the particular place where such trade and business is to be carried on; thus clearly defining a horse-dealer to be a person who "seeks his living by buying and selling horses." The 36 Geo. 3, c. 17, ss. 1 and 2, increased the amount of duty payable by horse-dealers, but continued, by section 8, all the powers and provisions of the 29 Geo. 3, c. 49, in relation to licenses granted to horse-dealers. Therefore the term "horse-dealer," in that act, will receive the same interpretation as given by the 29 Geo. 3, c. 49, s. 5. The 43 Geo. 3, c. 161, s. 84, continues the 29 Geo. 3, c. 49, except as to substituted duties. The 48 Geo. 3, c. 55, s. 2, recites the 43 Geo. 3, c. 161, and repeals the duties granted by that act; but section 5 renders the new duties subject to the provisions of the former act. The 52 Geo. 3, c. 93, only imposes additional duties. The mention of "makers" of carriages, and "vendors" of carriages by auction or commission, in the 43 Geo. 3, c. 161, s. 2, shews that the legislature understood the distinction between a vendor of a chattel on his own account, and a vendor for commission. Schedule (D), No. 5, of that act, preserves the same distinction between coachmakers and persons selling carriages; while Schedule (H), which relates to duties payable by horse-dealers, uses the same definition of "horse-dealer" as that contained in the 29 Geo. 3, c. 49, s. 5. That distinction and definition is kept up in the 52 Geo. 3, c. 93, s. 5, Schedule (D), Nos. 5, 6. An auctioneer, who might have sold a few horses in a year, would not thereby become a "horse-

dealer," within the meaning of those statutes; neither would a sheriff by selling horses under an execution. [*Parke*, B.—Is not the decision of the assessor, that the plaintiff is a horse-dealer, final and conclusive, unless appealed against?] The 69th and 70th sections of the 43 Geo. 3, c. 161, give a right of appeal to the commissioners against any assessment or surcharge; and, by the 73rd section, the appellants may demand a case for the opinion of a judge of one of the superior courts. Those provisions, however, do not exclude the party grieved from his right to maintain replevin. [*Parke*, B.—Your argument would go to this extent—that the validity of every assessment, instead of being supervised by commissioners, might be tried by judge and jury.] Perhaps the Court would interfere if the sheriff replevied, so as to prevent the collector from accounting at the periods fixed by the 48 Geo. 3, c. 141, Rule 5. The Highway Act, 5 & 6 Will. 4, c. 50, under which the question arose in *George v. Chambers* (a), contained a power of appeal, but it was nevertheless held that replevin would lie. [*Parke*, B.—In that case there was an entire want of jurisdiction]. It would be so here, if the plaintiff was not in fact a horse-dealer; and *Charleton v. Alway* (b) shews that, in such case, he need not appeal. Lord *Denman*, in delivering the judgment of the Court, says, "The only question is, whether the plaintiff ought to have appealed to the commissioners. We think that he was not bound to do so. Being assessed in respect of that which was not subject to the land-tax, he had as much right to treat the assessment as a nullity, as if it had been in respect of property not in his occupation. (See *Governors of Bristol Poor v. Wait* (c))." Until the 43 Geo. 3, c. 161, s. 73, there was no power of appeal against the assessment itself, but only against a surcharge or overcharge. With regard to the

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(a) 11 M. & W. 149. (b) 11 Ad. & E. 993; 3 P. & D. 618.

(c) 1 Ad. & E. 264.

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necessity of appeal, a distinction exists between the assessment of an individual in respect of a particular character which does not belong to him, and his being assessed in respect of property which he does not possess. *Marshall v. Pitman* (a) decided, that where a party, having no stock in trade, is rated as an inhabitant of a parish, his remedy is by appeal to the quarter sessions, and replevin will not lie. There the party, being an inhabitant and apparently in possession of personal property, was *prima facie* liable to be rated. But where a party was rated as the occupier of land in a particular parish, when in fact he had no land there, it was held that trespass would lie against the magistrates who granted a warrant of distress: *Weaver v. Price* (b). So here, if a party be rated for five horses, when he keeps but one, his only remedy is by appeal; but if he be assessed in respect of a particular trade, which he does not carry on, there is a total want of jurisdiction. Although the 43 Geo. 3, c. 99, s. 33, enacts, "that if any question or difference shall arise upon taking any distress, the same shall be determined by the commissioners of taxes," an action may nevertheless be maintained for a wrongful distress: *The Earl of Shaftsbury v. Russell* (c). [*Parke, B.*—Wherever a statute gives to certain persons the power of adjudicating upon a particular matter, their decision excludes all further inquiry. Here it is as if the statute had said, that the assessor shall decide whether or no the party is a horse-dealer; and the assessor having done so, his decision is final and conclusive, unless appealed against in the manner pointed out by the act: *Brittain v. Kinnard* (d); *Regina v. Bolton* (e)]. The assessor has only power to assess the party *being* a horse-dealer, not to clothe him with a character which he does not possess. The 43rd section of the 43 Geo. 3, c. 161, requires *every* horse-dealer to enter

(a) 9 Bing. 595.

(d) 1 Bro. & B. 432.

(b) 3 B. & Ald. 409.

(e) 1 Q. B. 66.

(c) 1 B. & C. 666.

in a book an account of the number of horses kept by him, whether for sale or use, and to what duty the same are liable, under a penalty of 50*l*. If, then, an assessor should determine that a person is a horse-dealer who in fact is not, such person might be rendered liable to the penalty. [*Parke, B.*—The assessor's decision is only conclusive *quoad* the assessment; and its effect is to bind the party, unless he appeals, to pay the sum of money set against his name in the schedule.]

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Pashley, contra.—First, replevin will not lie for goods seized as a distress for a debt due to the Crown. [*Parke, B.*—That objection cannot now avail. If a sheriff, *propter incuriam*, does replevy, the party grieved may maintain the action.] Secondly, the decision of the assessor, that the plaintiff is a horse-dealer, not having been appealed against, is final and conclusive. The 43 Geo. 3, c. 99, s. 9, requires assessors to bring in their assessments, verified on oath. By the 12th section, the commissioners are required to sign and seal the assessments. The 24th section enables persons surcharged to appeal to the commissioners; and the 29th section renders the determination of such appeal final, except where cases are required for the opinion of the judges. Similar provisions have received a judicial construction in the case of *The Earl of Radnor v. Reeve* (a), which arose under the 25 Geo. 3, c. 43, the 35th and 38th sections of which statute are identical with the 24th and 29th sections of the 43 Geo. 3, c. 99. In that case it was expressly held, that, where a statute declares the judgment of commissioners of appeal to be final, their judgment cannot be questioned in an action of trespass. The 33rd section of the 43 Geo. 3, c. 99, enables collectors to distrain without warrant, on refusal of payment of the duties. The 69th and 70th sections of the 43 Geo. 3, c. 161, extend to “any assessment” the right of appeal given by the 43 Geo. 3, c. 99, in respect of a surcharge. The words “any assessment,”

(a) 2 Bos. & P. 391.

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taken in their plain and ordinary sense, would clearly comprehend the case of a party altogether wrongly rated. The 33rd section of the 43 Geo. 3, c. 161, renders every assessment made by the assessors, on the neglect or refusal of any person to deliver lists, final and conclusive, unless they can bring themselves within the exception. *Weaver v. Price* (a) is distinguishable from the present case; for there, the plaintiff not being an occupier of any land in the parish, the magistrates were wholly without jurisdiction. So also, in *Charleton v. Alway* (b), the plaintiff was assessed to the land-tax in respect of that for which he was not liable to be assessed at all. But, under the circumstances stated in this case, the plaintiff is in fact a horse-dealer. It has been so decided, on appeal to the judges at Serjeant's Inn.

The Court then called on

Sir F. Thesiger to reply.—The 24th section of the 43 Geo. 3, c. 99, only gives the power of appeal in cases of "overrating"—that is, where a party is liable to be rated, but is rated for too much. *The Earl of Radnor v. Reeve* (c) was an action for distraining for one year's duty and surcharge on one male-servant, in which case it is conceded that the only remedy is by appeal. That decision comes within the same class as *Marshall v. Pitman* (d). The present case is not distinguishable in principle from *Weaver v. Price* (a), the one being an assessment in respect of land which the party did not occupy, the other an assessment in respect of a particular character which he did not possess. The party grieved has a right to seek redress in the superior courts, unless the statutes, in express terms, preclude him from bringing an action.

PARKE, B.—I am of opinion that the defendant is en-

(a) 3 B. & Ad. 409.
 (b) 11 Ad. & E. 993.

(c) 2 Bos. & P. 409.
 (d) 9 Bing. 595.

titled to judgment. The case may be treated as if the allegation that the plaintiff exercised the trade and business of a horse-dealer were struck out of the avowry. The remainder would then shew that an assessment was duly made by the defendant, being the assessor of the parish, and that the plaintiff was assessed in a certain sum, which was not paid. We may reject from our consideration the question whether, under circumstances like the present, replevin will lie. That point is settled by the case of *George v. Chambers*. The objection is not that the action of replevin will not lie, if a replevin be granted; but that the process of the Crown ought not to have been delayed by a return of the goods. The real question is, whether an action of trespass would lie. I am clearly of opinion that it would not. On a careful consideration of these acts of Parliament, they seem to me to differ from the statute of Elizabeth, as to poor-rate (a), and that the legislature intended that the assessment of the assessors appointed by the commissioners should be final and conclusive, unless appealed from, in the first place, to the commissioners, and further, if necessary, to the judges of the superior courts. It would be singular if there were no such provision; for, what a flood of litigation would follow, if every subject of the Crown, who was dissatisfied with the judgment of the assessors, had a right to dispute the propriety of their assessment in an action against the collectors. Actions would be innumerable, juries would have to decide on facts without end, judges on law, and cases would be carried to the highest tribunal, when the exigencies of the state required a speedy determination. Without referring to the statutes, I should say, à priori, that the object of the legislature was to make the decision of the assessor final and binding, unless disputed in the manner pointed out. On reading the statutes, I come to the same conclusion.

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(a) 42 Eliz. c. 2.

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By the 9th section of the 43 Geo. 3, c. 99, the commissioners are to meet and appoint assessors, who are to bring in their certificates of assessments verified on oath; and the assessors are thereby "required, with all care and diligence, to charge and assess themselves and all other persons chargeable with the said duties." If the language had been, "to charge and assess all such persons as they honestly and bonâ fide, after due care and diligence, believed to be chargeable," their assessment would, beyond all question, be final. But though the statute does not, in express terms, say that the assessment shall be conclusive, yet I find, on referring to the 30th section of the 43 Geo. 3, c. 161, which enables the assessors to assess persons who neglect or refuse to deliver lists, it is enacted that every such assessment "shall be final and conclusive upon the person thereby charged, who shall not be at liberty to appeal therefrom, unless such person shall prove that he or she was not at his or her dwelling-house or place of abode at the time of delivery of such notice, nor between that day and the time limited for delivering such lists as aforesaid to the assessor, nor unless such person shall allege and prove some other excuse for not having delivered his or her list, as the commissioners shall, in their judgment, think reasonable and sufficient." In that special case, the legislature has expressly made the assessment final and conclusive; and unless the party can bring himself within the exception, he has no opportunity of appealing. That being so, if a party, who has an opportunity of appealing, does not avail himself of it, it would be reading the acts very inconsistently to say that he is not equally bound by the assessment. Let us then look to the power of appeal, which possibly might be framed in such a way as to shew that the legislature did not mean it to be conclusive. This provision is contained in the 24th section of the 43 Geo. 3, c. 99, which enacts, "that, if any person shall think himself overcharged or overrated by any assessment or surcharge," &c., "it shall be lawful for him to appeal to the commissioners,"

&c. It is argued, that the wording of this clause shews that the legislature meant it to apply only to persons liable to be rated, but rated for too much. Admitting it to be so, and that the word "overrated" has that meaning, then this plaintiff is in the predicament of a person "overrated," since he is clearly liable to part of the rate; for it is stated by the avowry, that he was liable to "other duties amounting to 3*l.* 8*s.* 9*d.*, in which he was duly assessed," and which he paid. It is said that there is a difference between the present case, and that of a person who keeps five horses, and is rated for six; for this plaintiff never carried on the business of a horse-dealer. But I am at a loss to see any difference in principle. It is the same as if a person were rated for six horses and a male servant, or for seven male servants, when in fact he kept no male servant. In either case, he is equally "overrated." I think the word "overrated" in this act ought not to receive the narrow construction attempted to be put upon it. Though, in its strict sense, "overrating" means, rating for more than ought to be, yet it may also mean rating when the party ought not to have been rated at all. If the latter be not the meaning of the word in the statute, this absurdity would follow, that provision is made for the case of an excess of rating, and none whatever for a rate altogether unjust.

The case of *Weaver v. Price* (*a*), which arose under the Poor-rate Act, 42 Eliz. c. 2, is distinguishable; for that act only enables the overseers to rate the *inhabitants* of a parish, and consequently the justices had no jurisdiction to grant a warrant for enforcing a rate assessed on a party who had no land in the parish. Where, however, the party is an inhabitant, and he is rated for too much, the proper course is to appeal, and trespass will not lie. So, with respect to the case of *Charleton v. Alway* (*b*): there, by the terms of the stat. 20 Geo. 3, c. 17, s. 3, the assessors

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(*a*) 3 B. & Ad. 409.

(*b*) 11 Ad. & E. 993.

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were bound to distinguish between the different descriptions of land; and not having done so, and the plaintiff having paid the assessment in respect of a portion of the land, he was entitled to treat the assessment as a nullity. But the case of the *Earl of Radnor v. Reeve* (a) is in point. There the Court said, "that it had been determined by all the judges of England, that, when a statute provides that the judgment of commissioners appointed thereby shall be final, their decision is conclusive, and cannot be questioned in any collateral way." In like manner, if a statute gives magistrates jurisdiction to decide on a certain matter, and they, having the facts before them, do decide it, the propriety of their judgment cannot be inquired into, although they may have come to an erroneous conclusion. An assessment not appealed from stands precisely in the same situation as one confirmed after appeal. My judgment, therefore, proceeds as if the allegation, that the plaintiff was a "horse-dealer," were altogether struck out of the avowry. I am by no means prepared to say that the decision of the judges, as to the construction of the word "horse-dealer" in these statutes, was wrong. If I were forced to give an opinion, it might be in accordance with theirs; but if our decision on the other point be correct, the question does not arise. The verdict will, therefore, stand for the defendant.

ALDERSON, B.—I am of the same opinion.

ROLFE, B.—I am of the same opinion. Sir *Frederick Thesiger* seemed to think it somewhat anomalous, that an assessment in respect of a particular character, in which a party was not liable to be assessed, could not be questioned in an action, inasmuch as the effect would be to enable the officer to give himself jurisdiction. But our decision is not that an assessment made without jurisdiction will bind.

(a) 2 Bos. & P. 391.

For instance, if an assessor were to assess a person living altogether out of his district, or dealing in something in respect of which the act did not give any authority to assess him, the assessment might be questioned in an action. By the 9th section of the 43 Geo. 3, c. 99, the assessors are to make their assessments "according to the provisions of the laws then in force." But reading that and the other statutes in *pari materia*, I cannot feel a doubt but that the legislature meant to make the decision of the assessor as to matters within his jurisdiction, whether acquiesced in or appealed from and confirmed, absolute and conclusive.

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PLATT, B.—I am not prepared to bind myself by the decision which is said to have been come to by the judges, that, under circumstances like the present, a party is a "horse-dealer" within the meaning of the statutes. I state this, in order that I may not be taken to have pledged myself to that opinion, should the case come before me in a proper shape as one of the judges. But my difficulty is this, that, striking out of the avowry the allegation that the plaintiff was a "horse-dealer," enough remains to justify the act of the defendant. I cannot doubt but that the legislature intended the assessment to be binding, unless appealed against. Indeed, it is of the first importance that the revenue should be quickly raised. Then, for the protection of the subject, the legislature has given a right of appeal, first to the commissioners, and afterwards, by a special case before the judges; thus providing a cheap and expeditious remedy. Without saying, therefore, whether the facts of the case are sufficient to satisfy my mind that the plaintiff is a "horse-dealer" within the meaning of the act, I think the defendant is entitled to the judgment of the Court.

Judgment for the defendant.

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DOE v. WELLSMAN.

To a declaration in trespass for mesne profits, stating the entry and expulsion on the 10th of December, 1844, and the expulsion and taking of profits to have been continued till the 10th of March, 1846, the defendant pleaded, that the closes in which &c. were not, nor were any of them, or any part thereof, the plaintiff's, modo et formâ. The plaintiff replied to the whole plea, by way of estoppel, a recovery by the plaintiff against the casual ejector on a declaration in ejectment, stating the demise to have been on the 14th of October, 1845, for a term of twenty years; and the replication concluded with a prayer of judgment if the defendant, during that term, ought to be admitted, against the said recovery, record, and proceeding,

ing, to plead that plea:—*Held*, on special demurrer, that the replication applied only to part of the time of the trespass complained of in the declaration, and was therefore bad.

Quære, whether judgment by default against the casual ejector can be pleaded as an estoppel, and if so, whether it can be replied to a plea like the present, which contains no new matter.

TRESPASS for mesne profits. The declaration stated that the defendant heretofore, to wit, on the 10th day of December, A. D. 1844, with force and arms broke and entered the closes of the plaintiff, situate in the parish of Kentford, in the county of Suffolk—that is to say, the following allotments (describing them), and then ejected and expelled, put out and amoved the plaintiff from the possession and occupation thereof, and kept and continued him so expelled and amoved for a long time, to wit, from the day and year aforesaid until and upon the 10th day of March, A. D. 1846, and during that time took, had, and received, to the use of him the defendant, all the issues and profits of the said closes, &c.

Plea, that the said closes and allotments in the said declaration mentioned, in which &c., were not, nor were any or either of them or any part thereof, the plaintiff's, modo et formâ; concluding to the country.

Replication.—And the plaintiff, as to the plea of the defendant by him lastly above pleaded, says that the defendant ought not to be admitted to plead the said last plea, because the plaintiff says, that after the said time when &c. in the declaration mentioned, and before the commencement of this suit, to wit, in Trinity Term, A. D. 1845, in the Court of our Lady the Queen, before the Queen herself, at Westminster, Richard Roe was attached to answer John Doe, the plaintiff in this suit, of a plea of trespass and ejectment; and thereupon the said John Doe, by Y. Z., his attorney, complained for that whereas J. F. and M. A. B., on the 14th day of October, 1845, in the county of Suffolk,

demised to the said John Doe twenty acres of arable land, &c., with the appurtenances, situate and being in the said county, to have and to hold the same to the said John Doe and his assigns, from thenceforth for and during and unto the full end and term of twenty years from thence next ensuing and fully to be complete and ended; by virtue of which said demise the said John Doe entered into the said tenements last above mentioned, with the appurtenances, and was thereof possessed for the said term so to him granted; and the said John Doe being so thereof possessed, the said Richard Roe afterwards, to wit, on the 15th day of October, in the year aforesaid, with force and arms, &c., entered into the said tenements above mentioned, with the appurtenances, which were demised to the said John Doe in manner and for the term aforesaid, which was not then expired, and ejected the said John Doe from his said term, and other wrongs to the said John Doe then did, against the peace of our said sovereign Lady the now Queen, and to the damage of the said John Doe of 500*l.*; and thereupon he brought his suit, &c. And on the 5th day of November, in Michaelmas Term, in the year aforesaid, before our said sovereign Lady the Queen, at Westminster, came as well the said John Doe, by his attorney aforesaid, as the said Richard Roe in his own proper person; and the said Richard Roe thereupon gave the said Court of our Lady the Queen, before the Queen herself at Westminster, to understand and be informed, that after the delivery of the said declaration last aforesaid, and before that day, to wit, on the 16th day of October, A. D. 1845, he the said Richard Roe being informed that one John Wellsman was in possession of or claimed title to the tenements last aforesaid or some part thereof; and the said Richard Roe being sued in the action as casual ejector only, and having no claim or title to the same, advised the said John Wellsman to come and defend the force and injury when &c., in the declaration last aforesaid mentioned, in the stead of him the

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said Richard Roe, otherwise he the said Richard Roe would say nothing in bar or preclusion of the said action of the said John Doe. And on the 16th day of February, as of Hilary Term A. D. 1846, in the year aforesaid, before our said Lady the Queen, at Westminster, came as well the said John Doe, by his attorney aforesaid, as the said John Wellsman, by X. Y., his attorney; and thereupon the said parties respectively aforesaid, by their attorneys aforesaid, by leave of the Court of our said Lady the Queen, before the Queen herself at Westminster, consented that the said John Wellsman should be made defendant in the stead of the said Richard Roe, and should forthwith appear at the suit of the plaintiff, and receive a declaration in an action of trespass and ejectment for part of the tenements and premises aforesaid, which part the said John Wellsman admitted to be or consist of &c., situate and being in the parish of Kentford, in the county of Suffolk, for which he intended as tenant to defend the said force and injury when &c. And on the 6th day of March, as of the same Hilary Term A. D. 1846, came before our said Lady the Queen, at Westminster, the said Richard Roe in his own proper person, and as to &c. (a portion of the land) residue of the said tenements in the declaration last aforesaid mentioned, defended the force and injury when &c., and said nothing in bar or preclusion of the said action of the said John Doe: whereby the said John Doe remained therein undefended against the said Richard Roe, as to the said residue of the said tenements; therefore it was considered by the said Court of our said Lady the Queen, before the Queen herself, at Westminster, that the said John Doe should recover against the said Richard Roe, his term then to come of and in the said &c., residue of the tenements last aforesaid, with the appurtenances, and also his damages sustained by reason of the trespass and ejectment aforesaid; and thereupon the said John Doe prayed the writ of our said Lady the Queen to be directed to the she-

riff of the county aforesaid, to cause him the said John Doe to have possession of his said term then to come of and in the said &c., residue as aforesaid, with the appurtenances; and it was granted to him, returnable before our said Lady the Queen on the 15th day of April, A. D. 1846, wheresoever our said Lady the Queen, should then be in England; at which day, before our said Lady the Queen, at Westminster, came the said John Doe, by his attorney aforesaid, and the sheriff, to wit, Sir A. B., Bart., sheriff of the said county, then returned to the said Court of our said Lady the Queen, before the Queen herself, at Westminster, that, by virtue of the said writ to him directed, he had given full and peaceable possession unto the said John Doe of the said &c., residue as aforesaid, with the appurtenances in the said writ mentioned as therein, as he was commanded, as by the said record and proceedings thereof remaining in the said Court of our Lady the Queen, before the Queen herself, at Westminster, fully appears. And the plaintiff saith, that the now plaintiff, and the said John Doe in the said record and proceeding mentioned, are one and the same person, and not other or different persons, and that the now defendant and the said John Wellsman in the said record and proceeding mentioned, are one and the same person and not other or different persons. And the plaintiff further saith, that after the said John Doe had complained, as in the said declaration in the said record and proceeding in that behalf mentioned, and before it was considered by the said Court of our said Lady the Queen, that the said John Doe should recover, as in the said record and proceeding mentioned, to wit, on the 16th day of October, A. D. 1845, the said John Wellsman was advised by the said Richard Roe to come and defend the said force and injury when &c., in the said record and proceeding mentioned, in the stead of him the said Richard Roe, as in the said record and proceeding in that behalf mentioned; and that the said John Wellsman, at the time that the said John Doe com-

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plained, as in the declaration last aforesaid mentioned, and at the time the said John Wellsman was so advised by the said Richard Roe, as in the said record and proceeding mentioned as aforesaid, to wit, on the day and year last aforesaid, was tenant in possession of the tenements and premises in the declaration last aforesaid mentioned; and the plaintiff further saith, that the said closes and tenements in which &c., in the declaration in the cause mentioned, were and are parcel of the said &c., residue of the said tenements in the declaration in the said recovery and writ, record and proceeding respectively mentioned as aforesaid, and not parcel of other or different tenements; and that the said term of years, in the said record and proceeding mentioned, was at the said time, when &c., in the declaration in this cause mentioned, and thenceforth hitherto hath been and now is existing, subsisting, and not expired or determined; wherefore the plaintiff prays judgment if the defendant, during the said last-mentioned term, ought to be admitted, against the said recovery, record, and proceeding, to plead the said plea by him so lastly above pleaded as aforesaid, in manner and form, &c.

Special demurrer, assigning for causes (inter alia)—that it appears from the replication, that the term of twenty years therein mentioned was wholly fictitious; that the record therein stated was and is wholly void and invalid so far as the same relates to the now defendant; that the defendant is not estopped by the said record; that it does not appear that he is a party or privy thereto, or that he was the tenant in possession of the lands in this cause mentioned, or in anywise connected therewith; that the suggestion made by Richard Roe in the replication is wholly insufficient to make the now defendant a party or privy to the record or proceedings in the prior action; that it appears by the replication, that the term of years mentioned in the record and in the replication was not in existence or subsisting, and had not commenced, at the time when the defendant is in

the declaration in this cause alleged to have broken and entered the closes mentioned in the declaration, and there-out to have ejected and expelled the plaintiff; that the replication in this respect is insensible and repugnant; that the plea is a divisible plea, and that the plaintiff ought not to have replied the matter to the whole of the plea, but only to the trespasses committed after the commencement of the terms of years in the replication mentioned; and that the defendant ought not to be estopped by the judgment set forth in the replication.

Joinder in demurrer.

The case was argued in Hilary Term (Jan. 24), and in Easter Term (May 6), by

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Crompton in support of the demurrer.—This replication is bad, both in substance and in form. Before adverting to the consideration of the formal objections, it will be advantageous to consider what are the grounds upon which it is sought to plead, by way of estoppel, a judgment by default against the casual ejector. Such a judgment cannot so be pleaded in any form. It may be admitted that this judgment is evidence against the tenant in possession, as an admission of title in the plaintiff in ejectment. It is, no doubt, very cogent evidence, but it is not conclusive, and may be controverted. If it can be rebutted, it is not conclusive, and cannot be pleaded as an estoppel in law. On the rules of pleading and principle, and in the balance of authority, this cannot be pleaded as an estoppel. It sins against every principle of estoppels, as laid down in Co. Litt. 352 (a). It is not reciprocal. Even admitting that the defendant is estopped, there is no party estopped in return. Again, the defendant is no party to the record. In form, the preceding action was against a stranger, Richard Roe, and he might have been a real person. In substance, it was merely process to bring the tenant in possession before the Court.

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He might have appeared to support that position; and it must be contended that a party can be estopped by default of appearance, for which no authority will be found. The defendant cannot bring error on the judgment: if he were a party to the record, he clearly would be entitled to that privilege. This being a judgment by default against the casual ejector, is sufficient to distinguish the case from that of *Doe v. Huddart* (a), which was a judgment in ejectment. In the latter case, the plaintiff succeeded on the strength of his own title; but where there is judgment by default, it is only an admission by the tenant in possession that he has no title in himself. A third party may have the title. What course is the tenant to pursue? He cannot, with prudence, defend another party's right. If he does not, he ought not to be estopped from afterwards contesting the right in a suit in which he himself may have an interest: *Doe v. Wright* (b). *Aslin v. Parkin* (c) will no doubt be relied upon by the plaintiff. In that case the real question at the trial was, whether judgment by default against the casual ejector was *evidence* against the tenant in possession. Upon that point the decision was correct; for it was, no doubt, evidence; but the dicta of Lord *Mansfield*, which were purely extra-judicial, with regard to estoppels, cannot be considered as law. [*Parke*, B.—Surely *Aslin v. Parkin* has been acted upon ever since.] So far as it decided that this judgment is evidence, it has been, no doubt, but not to the extent that it is an estoppel. *Doe v. Huddart* is an instance of the incorrectness of the rule which had been laid down by Lord *Mansfield*. In the latter case, *Bolland*, B., in delivering the judgment of the Court, said: "Although, undoubtedly, there are to be found dicta of learned judges, and particularly of Lord *Mansfield* in *Aslin v. Parkin*, which have been transferred to the treatises upon evidence, as establishing that a judgment in

(a) 2 C. M. & R. 316.

(b) 10 Ad. & E. 763.

(c) 2 Burr. 665.

ejectment is conclusive as to the right of possession at the time laid in the declaration, and that is laid down by Mr. Phillipps, in his Law of Evidence, and upon which I acted at the trial, yet the Court think that these authorities are not entitled to so much weight, because they may be explained on the supposition that the point was not specifically presented to the Court, and the circumstances of those cases were such as would make it immaterial for those learned judges to distinguish between what is very *cogent* and what is *conclusive* evidence in the cause." [Parke, B.—If your argument be correct, it would not be advisable for any one to bring an action for mesne profits without strict proof of title. The action of ejectment is to clear the matter, and say to whom the title belongs.] It may be admitted that the judgment by default is very *cogent* evidence, but the plaintiff must now contend that it is not capable of being rebutted, and that *Doe v. Huddart* was wrongly decided. [Parke, B.—In the case of *Armstrong v. Norton* (a), in the Irish Court of Exchequer, a judgment by default against the casual ejector was held to be an estoppel in evidence, although not pleaded. Baron Pennefather there says: "In an action of trespass for mesne rates in the common form, when the defendant pleads the general issue, the plaintiff has no opportunity of relying upon the judgment as an estoppel in pleading, and unless he were to rely upon it in evidence, he would have no means of availing himself of the estoppel at all." He then proceeds to quote the rule as laid down in the case of *Trevivan v. Lawrence* (b), "that where the plaintiff's title is by estoppel, and the defendant pleads the general issue, the jury are bound by the estoppel; for here is a title in the plaintiff that is a good title in law, and a good title if the matter had been disclosed and relied on in pleading; but if the defendant pleads the special matter,

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(a) 2 Ir. L. Rep. 96.

(b) 2 Ld. Raym. 1048; 1 Salk. 276.

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and the plaintiff will not rely on the estoppel when he may, but takes issue on the fact, the jury shall not be bound by the estoppel, for then they are to find the truth of the fact which is against him." The New Rules, as is well known, are not in force in the Irish courts, and it is the practice to plead the general issue alone. That plea puts something more in issue than the mere title of the plaintiff, which might be, perhaps, a reason why the matter was not pleadable as an estoppel.] This Court, in *Doe v. Huddart*, did not proceed on the above grounds. Before the case of *Aslin v. Parkin*, in *Jefferies v. Dyson* (a), which was an action of trespass for mesne profits, the plaintiff, "when the defendant would have gone into the title, insisted he was estopped by the judgment; but the Chief Justice (Lord Hardwicke) held, that it would have been an estoppel if the present defendant had been made defendant in the ejectment, and the verdict against him; yet this judgment, to which he was no party or privy, could be none, and therefore he admitted the defendant to controvert the title." That case is precisely the same as that of *Doe v. Huddart*. *Smartle v. Williams* (b) is an authority to the same effect. The reasons why this judgment is evidence are given in *Doe v. Harvey* (c). It is evidence against those parties who are shewn to have had notice to appear; for, by not appearing, the party admits a title superior to his own; but it is not evidence against those who have not had notice: *Denn v. White* (d); *Hunter v. Britts* (e).

The replication is also bad, for the reasons pointed out by the special demurrer. The judgment set out is erroneous on the face of it, and yet a writ of error could not be brought upon it. It should be more explicitly stated and averred, that the tenant in possession had notice to appear. In the next place, it is averred that the defend-

(a) 2 Str. 960.

(b) 1 Salk. 245.

(c) 8 Bing. 239.

(d) 7 T. R. 112.

(e) 3 Camp. 456.

ant was tenant in possession at the time of the declaration in ejectment, but not that the time of the trespasses complained of was the same time. The defendant is entitled to plead to such period of time in the declaration as to which he is not estopped. Now the replication applies only to part of the time of the trespass complained of. The plaintiff should have replied to each portion of the plea, as was done in *Vivian v. Jenkin* (a). It may be that the whole of the trespasses for which the plaintiff seeks to recover were antecedent to the demise to him. Upon this latter ground the replication is clearly bad.

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Bovill, contra, was requested to confine his argument in the first instance to the latter point.—The second objection is not good. The replication is sufficient. This identical question was discussed and decided in *Doe v. Wright* (b). Lord *Denman* there says: “It was urged, indeed, that, viewing the replication in this way, it was open to another objection; that it did not extend so widely as the plea, because, although the plea might refer to the time of the cause of action accruing, it also refers to the time of the commencement of the action; and, as to this last, the replication shewing no re-entry, was no estoppel. But we think this objection received a sufficient answer at the bar. The plea is pleaded to the whole, and it is enough for the plaintiff to shew that it cannot be pleadable to that. The first plea, therefore, seems to us to be sufficiently answered.” This is a direct authority in the plaintiff’s favour. The plea is therefore answered if the estoppel answer any portion of it. The estoppel is, that the defendant ought not to be allowed to plead the plea. The authorities upon the point are collected in 2 Roll. Abr. 550, 553, 554.

As to the question which was first discussed, the replication is a good estoppel. In *Aslin v. Parkin*, all the judges were

(a) 3 Ad. & E. 741.

(b) 10 Ad. & E. 763.

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unanimously of opinion "that the nominal plaintiff and the casual ejector are judicially to be considered as the fictitious form of an action really brought by the lessor of the plaintiff against the tenant in possession. . . . That the lessor of the plaintiff and the tenant in possession are substantially and in truth the parties and the only parties to the suit. . . . That there is no distinction between a judgment in ejectment upon a verdict and a judgment by default." The whole of the judgment in that case is in the plaintiff's favour. The same doctrine was acknowledged in *Holdfast v. Morris* (a). In *Goodtitle v. Tombs* (b), *Wilmot*, C. J., said: "Before the time of Henry VII, plaintiffs in ejectment did not recover the term; but until about that time the mesne profits were the measure of damages. I brush out of my mind all fiction in an ejectment, the nominal plaintiff and the nominal defendant, the casual ejector, the dramatis personæ or actores fabulæ, and consider the recovery by default or after a verdict as the same thing, viz., a recovery by the lessor of the plaintiff of his term against the tenant in the actual wrongful possession of the land." The action for mesne profits, in fact, is in the nature of an assessment of damages after judgment by default on an action of ejectment, by which the title to the property has been settled and determined. The case of *Doe v. Wright* settles the point, that after verdict the judgment is conclusive. And there is no difference between judgment after verdict or by default, with reference to the finality of the judgment. It is an estoppel by record against a privy; and the defendant here is a party to the record. In *Goodtitle v. Tombs*, *Gould*, J., says: "This action may be brought either in the name of the nominal plaintiff in the ejectment or by his lessor; it follows the ejectment as a necessary consequence. The judgment by default in ejectment is of the very same effect in this case as if it had been after a verdict; and the Court

(a) 2 Wils. 115.

(b) 3 Wils. 120.

will intend every thing possible against the defendant, that there was an actual ouster, if that were necessary in this case; but I think proof of the judgment in ejectment, and the writ of possession executed, was sufficient in this case to warrant a verdict for the mesne profits." In *Bac. Abr. Eject. (H.)*, after stating that the matter was formerly doubted, it is said: "But it is now settled that, after a recovery in ejectment, the tenant is estopped from controverting the title in a subsequent action for mesne profits." So, in *Bac. Abr. Eject. (A.)*, the nature of this action is described, and certain rules are given for the prevention of any injury accruing to the parties really interested. It is there said: "The Courts declared that they would not give judgment unless the tenant in possession had notice of it, and an affidavit was made that he was served with a copy of the declaration." The legislature, therefore, has placed guards against the allowance of improper ejectments. It is said that error would not lie upon this judgment; but the Courts have power to mould the proceedings in such a manner as to allow it. It cannot be said that the defendant is not a party to the proceeding. It is alleged that he had notice. In *Hunter v. Britts (a)*, the defendant had no notice, which distinction is observed by *Tindal, C. J.*, in delivering judgment in *Doe v. Harvey (b)*. In *Ramsbottom v. Buckhurst (c)*, Lord *Ellenborough* said: "The judgment-roll imports incontrovertible verity as to all the proceedings which it sets forth; and so much so, that a party cannot be admitted to plead that the things which it professes to state are not true." This judgment at all events is good as long as it continues to exist. There is, therefore, no good reason why this judgment by default should not be pleaded as an estoppel, as other judgments may be.

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Crompton in reply.—In the case of *Armstrong v. Norton*,

(a) 3 Camp. 456. (b) 8 Bing. 241. (c) 2 M. & S. 567.

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the remarks of *Pennefather, B.*, were extra-judicial, and the question was not necessary to the decision of the case. The same objection exists to replying an estoppel to the plea of "not the plaintiff's close," as existed to replying it to the old plea of the general issue. Upon the old plea of the general issue, the plaintiff had to prove something in addition to the alleged possessory title, and so has he upon the plea of not the plaintiff's close; and therefore the same objection exists in both cases to this matter being replied by way of estoppel. With respect to *Doe v. Wright*, there the declaration must have been confined to the trespasses subsequent to the demise, or perhaps the Court thought the plea not divisible; but it has since been settled to be divisible: *Doe d. Bowman v. Lewis (a)*. [He also cited *Outram v. Morewood (b)*; *Strutt v. Bovingdon (c)*.]

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This case was argued before us a few days ago, on a demurrer to a replication. The declaration was in trespass for mesne profits, stating the entry and expulsion to have been on the 10th of December, 1844, and the expulsion and taking of profits to have been continued until the 10th of March, 1846. To this there was a plea, that the closes in which &c., were not, nor was any of them or any part thereof, the plaintiff's, modo et formâ. The plaintiff replied to the whole of this plea, by way of estoppel, a recovery by the plaintiff against the casual ejector, on a declaration in ejectment, stating the demise to have been on the 14th of October, 1845, for a term of twenty years; and the replication concludes with a prayer of judgment if the defendant during that term ought to be

(a) 13 M. & W. 241. (b) 3 East, 365. (c) 5 Esp. 59.

admitted against the said recovery, record, and proceeding, to plead that plea. To this replication there was a special demurrer, assigning many causes, and amongst the rest, that the estoppel applied only to part of the time of the trespasses complained of, and therefore should have been replied to part only of the plea.

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On the argument, this point was, amongst others, fully argued. We think it unnecessary to give an opinion on any other of the objections, being satisfied that this ought to prevail.

Assuming that there was an estoppel, and that it could be replied to *such* a plea (as to which we say nothing), it was an estoppel only to the possessory title of John Doe, on the 14th of October, 1845, and during the term of twenty years; whereas, under this declaration, the plaintiff might recover the mesne profits from the 10th of December, 1844. The plea is not an affirmative one, introductory of new matter, but a negative one, denying the allegation that the close in which &c. was the plaintiff's at the time of the trespasses. It is not an entire plea, which, if untrue in part, is untrue altogether, but divisible; and if, when part of the trespasses were committed, the close was the plaintiff's, and when the residue not, the plaintiff would recover as to part, and the defendant succeed as to the residue of the trespasses. If then the defendant were estopped as to part from denying the plaintiff's title, that was no reason why he should be as to the remainder. The replication is, therefore, though pleaded to the whole, an answer (if it be an answer at all) to part of the plea only; and, on that account, is clearly bad. But it was argued by Mr. Bovill, that this point had been otherwise decided in the case of *Doe v. Wright* (a). It cannot be denied that it is said by Lord Denman, in the course of the judgment, "that the plea of not possessed was pleaded to the whole,

(a) 10 Ad. & E. 763; 2 P. & D. 672.

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and that it is enough for the plaintiff to shew that it could not be pleadable to that," to make the plea bad. The objection to the replication did not appear so prominently in that case as it does in this, for there the first day in the declaration, and the day of the demise in the ejectment, were identical: and the terms covered the whole of the intermediate time to the commencement of the suit. Here a portion only of that time is covered; nor do the Court appear to have sufficiently adverted to the consideration that a traverse does not stand on the same footing in this respect as an affirmative plea containing new matter by way of confession and avoidance. We think our judgment must be for the defendant.

Judgment for the defendant.

May 16.

STONES v. MENHEM.

An action for work and labour as a bricklayer, is not a case in which a side-bar rule for a view ought to be granted.

Semble, that such rule, omitting the names of the shewers, and the time and place of meeting, is irregular.

THIS was an action of assumpsit for work done by the plaintiff, as a carpenter and bricklayer, to the defendant's house, and for bell-hanging, painting, and papering the same. The cause being at issue, the defendant, on the 8th of May, applied to the plaintiff to appoint a shewer on his part, to enable the jurors to have a view, and, on the plaintiff's refusal, served him, on that day, with the following side-bar rule:—

"In the Exchequer of Pleas.

"Easter Term, in the eleventh year
 of the reign of Queen Victoria.

"Monday, the 8th day of May, 1848.—Side-bar.—It is ordered, that a distringas for impannelling a jury shall issue in this cause, directed to the sheriff of the county of Mid-

dlesex, commanding that the aforesaid sheriff have six or more of the first twelve jurors impannelled to try the issue between the said parties, according to the form of the statute in that case made and provided, to view the place in question between the parties aforesaid, on , which said jurors shall meet at the house of

, known by the name of , at of the clock, in the noon of the same day, and there shall be refreshed, at the equal charges of the parties aforesaid; and that , on behalf of the said plaintiff, and George Corderoy, of 98, High-street, Marylebone, surveyor, on behalf of the said defendant, shall shew the place in question and dispute between the said parties to those jurors; but no evidence shall then and there be given them thereon in any sort, and that the same jurors who shall view the place aforesaid and appear, shall, before any drawing, be first sworn upon the jury for the trial of this cause.

“By the COURT.”

On the 9th and 10th of May respectively, the defendant served the plaintiff with two appointments to name a shewer, which the plaintiff declined to attend.

Horn, on the 11th of May, obtained a rule calling upon the defendant to shew cause why the above side-bar rule should not be set aside, on the grounds, first, that the case was not one in which a view ought to be granted; secondly, that the rule itself was defective, in not containing the names of both shewers, and the time and place of meeting of the jurors.

Cause was now shewn against this rule before *Parke*, B., at Chambers.

Argument for the defendant.—First, the work is defec-

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tive in many respects, and the nature of it cannot be properly appreciated unless the jury are permitted to have a view of the premises; and there is no reason why a rule for a view should not be granted in a case like the present, or even to inspect a house or any goods which have been sold. [*Parke, B.*—I doubt whether this is a proper case for a view. The 4 Anne, c. 16, s. 8, enacts, that where it shall appear to the Court that it will be proper and necessary that the jurors “should have the view of the messuages, lands, or place in question, in order to the better understanding of the evidence,” the Court may order writs of *distringas* to issue. It does not appear to me that a view of work done to a house can be considered a view of the “place in question.”] The rule for a view is not confined to cases where messuages or lands only are concerned; for, by the general rule of Hilary Term, 2 Will. 4, s. 63, it is ordered, that “the rule for a view may in *all cases* be drawn up by the officer of the court, on application of the party, without affidavit or motion for that purpose.” [*Parke, B.*—The effect of that rule is not to extend the law, and to allow a view to be granted in cases where it would not have been granted previously to the rule.] Secondly, the rule is correct in point of form. It is necessary to obtain a side-bar rule before the Master will make an appointment for the purpose of naming a shewer.

Horn, in support of the rule.—The question is, whether, prior to the rule of Hilary Term, 2 Will. 4, s. 63, the Courts, upon cause shewn against a side-bar rule like the present, would have made it absolute. It is confidently submitted that they would not. The Jury Act, 6 Geo. 4, c. 50, s. 23, uses the language of the 4 Anne, c. 16, and enacts, that the jurors are to have “a view of the place in question, in order to their better understanding the evidence;” which seems to imply that a view of the jurors is confined to the case where

some messuage or land is to be inspected, and the case cannot be made intelligible without such inspection. But here the view cannot be said to relate to any *place in question*; nor is it necessary towards the understanding of the evidence, for the state of the work can be made clear to the minds of the jury by means of the evidence of surveyors and other practical men. In Bagley's Practice (a), it is said, "that it sometimes happens, *most commonly* in actions of trespass quare clausum fregit, waste, and nuisance, that a view is denied, and in practice it is certainly unusual for the Court to grant a view in cases merely of work done to premises." It cannot be contended that the Court would in all cases grant a view of goods, merely because they might be too bulky to be brought into court.—Secondly, the side-bar rule is itself irregular; it ought to have contained the place and hour of the attendance of the jury, and especially the names of *both* shewers. The practical directions given in Bagley's Practice are, "that if the opposite party refuses to name a shewer, the attorney on the other side is to get an appointment from the Master to name a shewer; that a *memorandum* of the rule, with the name and place of abode of the one shewer, and of the shewer nominated by the adverse party, or by the Master, on his default, is to be taken to the office, and the clerk will draw up the rule." This shews that the side-bar rule ought to contain the name and abode of *both* shewers. [*Parke, B.*—The practice is stated in similar terms, in Archbold's Practice, p. 407 (b):—"Draw up a *præcipe* or memorandum of the rule you want. Get from the opposite attorney a memorandum of the name and place of abode of his shewer, and take it, together with a similar memorandum of your *own shewer*, and also of the time and place of meeting, &c., to one of the Masters, and draw up the rule.]

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(a) Page 328.

(b) Sixth edition.

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PARKE, B.—The rule for setting aside the side-bar rule must be absolute. The language of the acts of Parliament, coupled with the practice, appears to me to shew that this is not a case in which a view ought to be granted. The necessity of a view seems to me to apply chiefly to actions of a local nature, such as trespass quare clausum fregit, nuisance, and the like. Judges are often requested to make orders for one of the parties to be at liberty to inspect work done and other matters, and we generally refuse such orders unless the opposite party will give his consent; but, according to the defendant's argument, a view by the jurors might be obtained in such cases as a matter of course. The rule will be made absolute, the costs to be costs in the cause.

Rule absolute accordingly (*a*).

(*a*) Ex relations *Horn*.

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IN THE EXCHEQUER CHAMBER.

(In Error from the Court of Exchequer.)

THORPE v. PLOWDEN.

May 15.

THIS was a feigned issue, brought in the Court of Exchequer, under the 46th section of the 6 & 7 Will. 4, c. 71, to try the plaintiff's right to the tithes of Aston-le-Walls, in the county of Northampton. The cause came on for trial at the Midsummer Assizes for Northamptonshire in 1844, when a verdict was taken for the plaintiff by consent, subject to a special case, with liberty to turn it into a special verdict, if allowed by law. The special case was argued before the Barons of the Court of Exchequer in the sittings after Trinity Term, 1845 (*a*), when judgment was given for the defendant. In Michaelmas Term, 1845, the plaintiff obtained a rule absolute in the first instance, whereby "it was ordered that the said special case be turned into a special verdict." Subsequently, by a judge's order, the Nisi Prius record was altered, by inserting thereon the special case as a special verdict of the jury, in pursuance of the last-mentioned rule. A writ of error having been brought upon this judgment by the plaintiff, a rule was obtained on behalf of the defendant in December last, calling upon the plaintiff to shew cause why the writ of error so brought should not be quashed. Against this rule

Error does not lie on a judgment of a superior court, upon a feigned issue brought under the 46th section of the Tithe Commutation Act, 6 & 7 Will. 4, c. 71; and the Court of Exchequer Chamber quashed a writ of error so brought.

Willes shewed cause (*b*) (February 5).—It will be contended by the other side, that under the 46th section of the

(*a*) 14 M. & W. 520.

(*b*) Cor. *Patteson*, J., *Colt-*

man, J., *Maule*, J., *Wightman*, J.,

Cresswell, J., and *Erie*, J.

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Tithe Commutation Act, 6 & 7 Will. 4, c. 71, no writ of error lies upon the judgment of the Court below. Although this is in point of *fact* a proceeding under that act, it does not of necessity appear upon the face of the record that it is not a proceeding in an ordinary action; upon which supposition a writ of error would lie. The present question, however, mainly turns upon the section to which reference has already been made, and which provides that persons dissatisfied with the commissioners' decision may cause an action to be brought in any of the superior courts. This action is commenced by writ of summons, and is *prima facie* subject to all the proceedings of an ordinary action. The act does not leave the parties to adopt an interpleader issue, which is proceeded with without a writ of summons. [*Patteson, J.*—In the case of *Fellowes v. Clay* (a), my Brother *Coleridge* withdrew his judgment, in order that the cause might go down again for trial, and that a bill of exceptions might be tendered.] That case, with many others, awaits the decision of *Salkeld v. Johnson*, which is now pending in the Court of Exchequer (b). It has never found its way into a court of error. In the case of *King v. Simmonds* (c), a writ of error was quashed by the Court of Exchequer Chamber, but that was an interpleader issue. In the present case the Court cannot be ousted of its jurisdiction, unless its power is expressly taken away by the act of Parliament. In *King v. Simmonds*, in the judgment of the Court of Exchequer Chamber, great stress was laid upon two points which do not apply to the present case. First, that it was not the intention of the legislature, in requiring a judgment to be entered on the feigned issue, to give to the litigant parties the power of bringing a writ of error thereon, more especially as it is not required that a writ of summons should be sued out in the feigned issue, to warrant that judgment; and that, if it had been

(a) 4 Q. B. 313.

(b) Ante, p. 256.

(c) 7 Q. B. 289.

meant that the judgment should be capable of being reviewed by writ of error, it would have been provided that it should resemble an ordinary judgment in an action, and that the judgment without a writ would be an anomaly: and secondly, that the judgment, so called, in the 2nd section of that act, is not a judgment to be entered in the ordinary way, but in a special manner pointed out in the 7th section. But, in the present case, there is a writ of summons, by which the proceedings are commenced, and also the judgment is in the ordinary form. The defendant, having obtained the judgment of the Court below, ought to be estopped from saying that a writ of error will not lie upon that judgment; although the language of the 46th section is, that the verdict or judgment of the Court shall be final, and binding upon all parties thereto; and this has the quality of an ordinary judgment, which is its finality and conclusiveness. It was, therefore, the intention of the legislature to put this judgment upon the same footing, and to make it subject to the same rules as an ordinary one. It is submitted that this is the true construction of the words in the 46th section. The jurisdiction of the superior courts is not to be taken away by an act of Parliament, unless by express language.

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Watson and Pigott, contra.—A writ of error does not lie in the present case. It is admitted that this is a proceeding under the Tithe Commutation Act. The object of that act was to settle questions between the land and tithe-owners. The 46th section speaks of these proceedings as an action, but there are many other incidents attached to them than are to be found in an ordinary action. This proceeding is for the purpose of correcting the decision of the commissioners, and it is only intended to accomplish that object. By the 46th section, the judge has the power to compel the parties to produce all deeds, &c.; and he

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may direct the jury to find a verdict, subject to the opinion of the Court upon a special case: "and the verdict which shall be given in such action, or the judgment of the Court upon the case, subject to which the same may be given, shall be final and binding upon all parties thereto, unless the Court shall set aside such verdict and order a new trial." It is not competent for this Court to deal with the decision of the Court below, as it is not intended that the judgment should be entered of record. The costs are in the discretion of the Court. It is laid down, in *Bac. Abr.*, as taken from 1 *Salk.* 263, that "whenever a new jurisdiction is created by act of Parliament, and the Court or judge that exercises that jurisdiction acts as a court or judge of record, according to the course of the common law, a writ of error lies on their judgment; but when they act in a summary method, in a new course, different from the common law, there a writ of error does not lie, but a certiorari." Now the 46th section says, "that it shall be lawful for the judge by whom any such action shall be tried, if he shall think fit, to direct the jury to find a verdict, subject to the opinion of the Court upon a special case; and the verdict which shall be given in any such action, or the judgment of the Court upon the case subject to which the same may be given, shall be final and binding upon all parties thereto, unless the Court wherein such action should be brought shall set aside such verdict, and order a new trial to be had therein, which it shall be lawful for the said Court to do, if it shall think fit." The meaning of which is, that the verdict, subject to the opinion of the Court upon a special case, shall be conclusive, except where the Court shall think it proper to set aside the verdict and grant a new trial. The proceedings, therefore, cannot be reversed by writ of error. The commissioners might be compelled by mandamus to act in pursuance of the verdict, even if the

judgment of the Court of Exchequer were set aside by writ of error.

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Willes replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

PATTESON, J.—This was a motion to quash a writ of error brought on a judgment of the Court of Exchequer, upon the ground that under the circumstances a writ of error will not lie. It was a feigned issue, brought under the provisions of the stat. 6 & 7 Will. 4, c. 71, s. 46, in which a verdict was found for the plaintiff, subject to a special case, which was afterwards turned into a special verdict, and judgment given for the defendant.

The statute in question provides that a party, dissatisfied with the decision of a tithe commissioner, may cause an action to be brought, and deliver a feigned issue; that the parties shall produce all deeds, &c.; that the judge may direct the jury to find a verdict, subject to the opinion of the Court on a special case: “and the verdict which shall be given in such action, or the judgment of the Court upon the case, subject to which the same may be given, shall be final and binding upon all parties thereto, unless the Court shall set aside such verdict and order a new trial.” It then directs, that if the facts be not disputed, a case may be stated at once for the opinion of the Court, and the decision of such Court shall be binding upon all parties concerned therein. “Provided always, that after such verdict given, and not set aside by the Court, or after such decision of the Court, the said commissioners shall be bound by such verdict or decision, and the costs of every such action, or of stating such case and obtaining a decision thereon, shall be in the discretion of the Court in or by

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which the same shall be decided, which may order the same to be taxed by the proper officer of the court, and the like execution may be had for the same as if such costs had been recovered upon a judgment of record of the same Court." Nothing is said in express terms as to a special verdict; nor could it be necessary, if the opinion of one Court was intended to be conclusive, because that opinion could be obtained as well on a special case as a special verdict.

If the facts be undisputed, it is plain that no opportunity of reviewing the decision of the Court upon questions of law was meant to be afforded; nor can any reason be assigned why any distinction should be made, and that decision should be reviewed after the facts are ascertained by a jury, since the law only, and not the facts, would be submitted to a court of error upon a special verdict. Again, power is given to the judge at the trial to *direct* a special case, which he cannot do at common law; and such power would seem to have no object but that of confining the decision on the law to one Court, whose decision should be final and conclusive, by enabling the judge, without the consent of the parties, so to shape it.

Further, it should seem that the proviso as to costs shews that no judgment of record was intended to be pronounced, because it directs the costs to be in the discretion of the Court, and that they may be obtained by execution, in like manner *as if they had been recovered upon a judgment of record*, which excludes the supposition that a judgment of record was intended to be entered up.

But it is argued, that, as an action is to be brought, all the incidents of an action will attach, and amongst them the finding of a special verdict (which is not in terms prohibited), and a judgment thereon; and therefore that this case is distinguishable from that of a feigned issue under the Interpleader Act, in which there is no action; and

therefore the case of *King v. Simmonds* (a) is no authority upon the present occasion, nor the case of *Snook v. Mattock* (b). Those cases, however, proceeded, not so much on the ground that no writ was to be issued, or action brought, as upon the plain intention of the legislature, that no ordinary judgment of record should be entered up. We are of opinion, looking at all the provisions of the act in question, that the same plain intention of the legislature appears in the 46th section, on which this question arises, and that the same consequence follows—namely, that the legislature, intending to exclude a judgment of record in feigned issues under this act, has in effect excluded any writ of error.

We are of opinion, that, whether the facts be put in the shape of a special case or a special verdict, the Court has power only to direct how that verdict shall be entered, which is made binding on the commissioner, but that no judgment of record can be entered, on which to ground a writ of error. This being so, the case of *King v. Simmonds* is a direct authority to shew that the proper course is for this Court to quash the writ of error; and the present rule must be made absolute.

Rule absolute.

(a) 7 Q. B. 298.

(b) 5 Ad. & E. 239.

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REGULA GENERALIS.

THE following rule was read in Court in Easter term:—

“IT is ordered, that no subpoena duces tecum be issued for enforcing the production of any record of the acts of any court, deposited in the Public Record Office pursuant to the statute 1 & 2 Vict. c. 94, or any other document or minute of proceedings, officially filed of record in any court, and deposited in the Public Record Office, pursuant to the said statute, without an order of the Court out of which the said subpoena shall issue, or of some judge thereof.

(Signed by)

“DENMAN.	“T. COLTMAN.
“THOS. WILDE.	“R. M. ROLFE.
“FRED. POLLOCK.	“WM. WIGHTMAN.
“J. PARKE.	“T. J. PLATT.”
“J. PATTESON.	

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TRINITY TERM, 11 VICT.

CLARK v. WOODS, SMITH, and COOPER.

1848.

June 3.

TRESPASS for assault and false imprisonment.—Plea, not guilty “by statute.”

It appeared at the trial, before *Pollock*, C. B., at the London Sittings after Michaelmas Term, 1847, that, in consequence of the plaintiff, who resided at South Bersted, in the county of Sussex, refusing to pay his poor-rates and certain costs incurred for the same, the following warrant for his apprehension had been issued by Mr. Woods and Mr. Smith, two of the defendants, who were magistrates for

The stat. 43 Eliz. c. 2, s. 4, which gives a remedy for the levying of money assessed for poor-rates, does not extend to costs; and the 18 Geo. 3, c. 19, s. 1, under which justices have power to award costs in such a case, limits the period for which

the defaulter can be imprisoned to the term of one month.

A warrant issued by two justices of the county of S., after reciting the making of a rate, the assessment of the plaintiff in the sum of 17*l.* thereto, and his refusal to pay the same, and that R. H. and L. W., two justices &c., had issued their warrant to levy the said sum of 17*l.* 19*s.* 6*d.*, and the further sum of 6*s.* for costs incurred in the premises, making in the whole the sum of 18*l.* 5*s.* 6*d.*, by distress &c., commanded the constable to apprehend and take the plaintiff to the House of Correction, there to remain “until payment of the said sum:”—*Held*, that the warrant was bad in toto; and that an action of trespass lay against the justices and the constable for the arrest and imprisonment under it.

The backing of the warrant under 24 Geo. 2, c. 55, s. 1, by a justice is purely ministerial, and the justice who issues the warrant is responsible for an arrest under it, although it be backed and executed in a county other than that in which it was issued.

A demand of the copy and perusal of the warrant, signed by the plaintiff’s attorney, was left by his clerk:—*Held*, a sufficient demand under 24 Geo. 2, c. 44, s. 6.

Where the plaintiff had obtained a copy of the warrant previously to a demand thereof—*Held*, that the constable was not thereby excused from complying with the demand.

The mere fact of the justices being joined in the action against the constable does not entitle the constable to a verdict under the 24 Geo. 2, c. 44, s. 6, which section only protects him in case he has complied with the demand of a copy and perusal of the warrant.

A party having been arrested under the foregoing warrant, and having paid under protest the money specified in it—*Held*, that he was entitled to recover back the whole of the money so paid, although the 17*l.* 19*s.* 6*d.* was really due from him in respect of the rate.

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that county, and was delivered to Cooper, the other defendant, to be executed by him :—

“Sussex, to wit.—To the constables of the parish of South Bersted, in the county of Sussex, and to the keeper of the House of Correction.—Whereas, in and by a rate and assessment made, assessed, allowed, and published according to the statute in that case made and provided, bearing date the 5th of July and 13th of December, 1845, and the 20th day of March, in the year 1846, Richard Clark, an inhabitant and occupier of lands and hereditaments in the said parish of South Bersted, was duly rated and assessed for and towards the necessary relief of the poor of the said parish, in the sum of 17*l.* 19*s.* 6*d.* in the whole; and whereas it duly appeared unto Richard Hosler and William Leyland Woods, Esqrs., two of her Majesty’s justices of the peace in and for the said county, as well upon the oath of Cornelius Legg Sparks, assistant-overseer of the poor of the said parish, as otherwise, that the said sum hath been lawfully demanded by him, but the said Richard Clark hath refused and doth refuse to pay the same; and whereas the said Richard Clark, having been summoned duly to appear before two of her Majesty’s justices of the peace of the said county, to shew cause why the same should not be paid, did not appear according to such summons, and hath not shewn any sufficient cause why the same should not be paid; and whereas, on the 25th day of April last, Richard Hosler and William Leyland Woods, two of her Majesty’s justices of the peace in and for the said county, did issue their warrant to the churchwardens and overseers of the poor of the said parish of South Bersted, to levy the said sum of 17*l.* 19*s.* 6*d.*, and also the further sum of 6*s.* for costs incurred in the premises, making in the whole the sum of 18*l.* 5*s.* 6*d.*, by distress and sale of the goods and chattels of the said Richard Clark, and to apply the same according to law; and whereas it duly appears unto us, two of her Majesty’s justices of the peace for the said county, as well upon oath of the said Cornelius

Legg Sparks as otherwise, that he has used his best endeavours to levy the said sum on the goods and chattels of the said Richard Clark as aforesaid, but that no sufficient distress can be had whereon to levy the same: these are therefore to command you, the said constables of the said parish of South Bersted aforesaid, to apprehend the body of the said Richard Clark, and him safely to convey to the House of Correction at Petworth, in the same county, and there to deliver him to the said keeper thereof, together with this precept; and we hereby command you, the said keeper of the said House of Correction, to receive into your custody, in the said House of Correction, the said Richard Clark, there to remain, without bail or mainprise, until payment of the said sum.—Given under our hands and seals, the 31st day of October, A. D. 1846.

“W. LEYLAND WOODS (L.S.)

“FRANCIS SMITH (L.S.)”

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The plaintiff was followed by the defendant Cooper to London, where he presented the warrant to the Lord Mayor and got it backed; he then arrested the plaintiff and took him to a station-house. The plaintiff paid the sum of 18*l.* 5*s.* 6*d.* under protest. It appeared that a demand of the copy and perusal of the warrant, signed by the plaintiff's attorney, had been served by one of his clerks at Cooper's residence. No copy or perusal of the warrant had ever been granted by Cooper; but whilst the plaintiff was in custody at the station-house, a copy of the original warrant was made by the clerk of the plaintiff's attorney, by the permission of the police, in whose hands the warrant then happened to be.

It was thereupon contended, on the part of the plaintiff, that, as the statute 43 Eliz. c. 2, s. 4, gives no power to levy or imprison for non-payment of costs, the warrant was bad, and offered no defence to the action; and that the plaintiff was entitled to recover back the sum of 18*l.* 5*s.* 6*d.*,

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which had been paid by him under protest. On the part of the defendants, the following objections were raised to the maintenance of the action:—First, that the warrant was good; that, by the stat. 18 Geo. 3, c. 19, power is given to the justices to award costs in cases of non-payment of poor-rates; secondly, that, if the warrant was bad on the face of it, the justices were not liable for the execution of it out of their jurisdiction; and, thirdly, that the warrant was only bad so far as it related to costs, and that the amount of damages ought to be confined to that sum. On the part of the constable, Cooper, the following objections were also made:—First, that he was justified under the stat. 24 Geo. 2, c. 44, s. 6, as the magistrates had been sued jointly with him; secondly, that the service of the demand of a copy of the warrant, by the clerk of the plaintiff's attorney, by whom the demand was signed, was insufficient, as it ought to have been made by the person making the demand; and, lastly, that the copy of a warrant having been furnished by the police, this was a sufficient compliance with the statute, and dispensed with the necessity of a delivery of one by the constable. The Lord Chief Baron, however, overruled the several objections which had been relied upon by the defendants; and, under his direction, a verdict was entered for the sum of 18*l.* 5*s.* 6*d.*, reserving leave to the defendants to move to enter a verdict, or to reduce that sum to 6*s.*

Rules nisi having been accordingly obtained on the part of the justices and of the constable,

Martin, Willes, and C. E. Pollock shewed cause.—The questions in the present case depend mainly upon the following statutes, viz. 43 Eliz. c. 2, s. 4; 18 Geo. 3, c. 19, s. 1; 24 Geo. 2, c. 55, s. 1; 24 Geo. 2, c. 44, s. 6. The warrant under which the plaintiff was arrested is clearly illegal; for the statute of 43 Eliz. c. 2, s. 4, does not empower the justices to award costs; and the statute 18 Geo. 3, c. 19, s. 1, by which costs

may be awarded, directs the imprisonment to be "for any time *not exceeding one month*, nor less than ten days, or until such sum, &c. be first paid." This section, as it may be seen by the 3rd section and the forms annexed to the act, limits the period of imprisonment to one month. In the present case the plaintiff would be liable to be imprisoned for life, if one item of the whole amount remained unpaid; for the warrant directs that he is to remain in custody, "without bail or mainprise, until payment of the said sum." The plaintiff was not to be released until the whole sum—namely, for rates and costs—should be paid. In *Skingley v. Surridge* (a), which may be relied upon by the defendants, the warrant of distress directed the officer to levy the sum of 28*l.* 5*s.* 5½*d.*, (the amount of a poor-rate), and also the further sum of 11*s.* 6*d.* for costs incurred, making in the whole the sum of 28*l.* 16*s.* 11½*d.*, together with the reasonable charges of taking and recovering the said distress. The goods seized under the warrant were replevied, and the defendants made cognizance, justifying the seizure of the goods only, under the 43 Eliz. c. 2, s.19. *Parke, B.*, in delivering the judgment of the Court, says, "On the face of the warrant, the sum demanded for the rate (which on this branch of the argument is assumed to be legally demanded) is distinguishable from the sum which is assumed to be illegally demanded; the rate legally due was duly claimed and refused; and the plaintiff had the means of tendering the precise sum, to save the necessity of seizing or selling; and nothing was done under that distress which the warrant to distrain for the poor-rate did not justify." Now, here, the words "said sum" refer to the last-mentioned sum of 18*l.* 5*s.* 6*d.*, which includes costs and rates: *Esdaile v. Maclean* (b). The warrant is not divisible. The warrant is therefore clearly illegal and bad; but it is contended, that, even admitting it to be so, the justices are not liable for the arrest of the plaintiff, which,

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(a) 11 M. & W. 503.

(b) 15 M. & W. 277.

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although it was effected under a warrant issued by them, was executed out of their jurisdiction. By the 24 Geo. 2, c. 55, s. 1, in case any person, against whom a warrant shall be issued by any justice of the peace of any county, &c., shall escape, &c., it shall be lawful for any justice of the county, &c., to which such person shall escape, &c., upon proof being made on oath of the handwriting of the justice or justices granting such warrant, to indorse his name on such warrant, which shall be a sufficient authority to the person or persons bringing such warrant, &c., to execute such warrant in such other county. The justice, therefore, who indorses or backs the warrant, exercises no discretion in the matter—he performs a purely ministerial act. The words of Lord *Kenyon*, in *Rex v. Kynaston* (a), are very apposite to this matter. After looking into the act of the 35 Geo. 3, c. 101, his Lordship said, “It is peremptory upon the magistrate, under these circumstances, to indorse the warrant; he has nothing to do with the propriety of making the original order or granting the original warrant. He acts ministerially; in like manner as justices do in allowing a poor-rate, whose signatures are mere matter of form.” The justices, therefore, who issued this warrant are liable for the arrest. The warrant is void in toto, and there is no reason why the verdict should be reduced to the sum of 6s. Lord *Denman*, C. J., in *Sowell v. Champion* (b), said, “Parties are not to extort even what is justly due, by the improper execution of a warrant. It might lead to the most fatal consequences if we were to hold otherwise.” The plaintiff has obtained a verdict for the sum only which he paid under protest.

With respect to the objections which were raised on behalf of the defendant Cooper, the constable, as the warrant is illegal, he is not justified under it; for the 6th section of the 24 Geo. 2, c. 44, does not afford him any protection. A proper demand of the copy and perusal of the war-

(a) 1 East, 117.

(b) 6 Ad. & E. 411.

rant was made, and was not complied with. The 6th section of the last-mentioned act enacts, that no action shall be brought against any constable for anything done in obedience to any warrant, under the hand &c. of any justice of the peace, until demand hath been made or left at the usual place of his abode by the party intending to bring such action, or by his attorney or agent, in writing, signed by the party demanding the same, of the copy and perusal of such warrant. This demand must therefore be signed by the party intending to bring the action, but it need not be by the person who *personally* makes the demand. The words "*made*" and "*left*" are the same in this section. And the demand was not complied with by the defendant Cooper. *Atkins v. Kilby* (a) is distinguishable. There, on demand by the plaintiff's agent of a copy and perusal of the warrant, the defendants gave a copy, and said that the original was in the hands of the gaoler. The agent said he knew that, and made no objection to the tender of a copy. The gaoler, in fact, always kept such warrants. Lord *Denman* there said, "The demand of a perusal of the warrant was made by the agent of the plaintiff; and his conduct was such as to lead to the belief that the delivery of a copy, under the circumstances, was all that was required." It will also be contended, that, inasmuch as the justices are sued jointly with the constable, proof of the warrant having been given, the defendant is entitled to a verdict, under the 6th section of the 24 Geo. 2, c. 44, s. 6, the words of that section being, "*And if such action be brought jointly against such justice, and also against such constable, &c., then, on proof of such warrant, the jury shall find for the constable, &c., notwithstanding such defect of jurisdiction.*" The meaning of this section is, that the constable shall be entitled to a verdict, after such a demand and compliance as is required by the preceding part of the clause.

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(a) 11 Ad. & E. 777.

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Crowder and *J. J. Johnson*, in support of the rule, on behalf of the justices.—The warrant is good. It has been assumed that the words “the *said* sum” refer to the last-mentioned sum; but these words do not necessarily require such a construction. [*Pollock*, C. B., referred to *Esdaile v. Maclean* (a).] The justices would have a difficulty to overcome in framing such a warrant as would meet the case in the manner which has been insisted upon by the plaintiff. Under the statute of Elizabeth, the party may be committed generally for non-payment of rates, and under the statute which gives costs, for a month only. How could such a warrant be framed? [*Alderson*, B.—There might possibly be two warrants—one to detain the party for a month, or until he paid the costs, and the other to detain him until he paid the rates; or perhaps one warrant would be sufficient, provided it observed the proper distinction with respect to each sum.] The recitals in the warrant, which refer to “the *said* sum,” mean the sum due for rates: *Tarry v. Newman* (b). In the second place, assuming the warrant to be void, the justices are not liable. The arrest was out of their jurisdiction. The magistrate who backs the warrant has a discretion in the matter, and his act is ministerial only in case the warrant is good. Here it has been argued that the warrant is void upon the face of it; and the backing of such a warrant cannot make the justice who issued it responsible out of his jurisdiction. The statute which empowers the justice to back the warrant only entitles him to back a valid warrant. If this warrant is bad, it is merely an illegal order to arrest the plaintiff. The Lord Mayor could not have been compelled to back it by mandamus. [They cited *Basten v. Carew* (c), *Carratt v. Morley* (d), and *Mould v. Williams* (e).] [*Pollock*,

(a) 15 M. & W. 277.

(b) Ibid. 645.

(c) 3 B. & C. 649.

(d) 1 Q. B. 18.

(e) 5 Q. B. 469.

C. B.—The statute does not make any reference to the validity or invalidity of the warrant. Proof of the handwriting of the justice by whom the warrant was issued is all that the statute requires.]

In the last place, the plaintiff is entitled only to the sum of 6*s.* by way of damages, as the warrant is good for the other sum due for rates, for which the plaintiff was liable to be arrested.

Bramwell, on behalf of Cooper, the constable.—The warrant is good, and the constable is not liable; and, even admitting the justices to be liable, the constable is not. They authorised him to act by the execution of the warrant in any county; for the warrant, by being backed, extends their jurisdiction. First, there was no proper demand made; for the 6th section of the 24 Geo. 2, c. 44, requires the party who makes the demand to sign it. In the present case that was not so; for the attorney signed the demand which was made by his clerk. There are three parties who may make the demand. It has been argued that the words “made” and “left” mean the same thing, but that is not so. The party here who made the demand was the attorney’s clerk, and therefore it should have been signed by him. Secondly, the demand, if sufficient, was complied with. *Atkins v. Kilby* (a) is in the constable’s favour. What need had the plaintiff of a further copy of the warrant than the one which the attorney’s clerk had obtained from the police? Thirdly, under the concluding clause of the 6th section of the last-mentioned act, the constable is protected, although he may not have complied with the demand. The words of the act are, “And if such action;” in order to support the construction for which the plaintiff contends, the word “and” ought to be “but.” In the last place, with respect to the amount of damages. The original

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arrest is the act complained of, and the plaintiff was released, therefore, before the money was paid; he can at all events recover nominal damages only in the present action.

POLLOCK, C. B.—I am of opinion that these rules ought to be discharged. At the trial a verdict was taken by the plaintiff for 18*l.* 5*s.* 6*d.*, being merely the sum which had been paid by him under protest. The facts of the case are shortly as follows :—The plaintiff owed certain poor-rates in the county of Sussex. An application was made to two magistrates to compel him to pay these rates; they thereupon granted a warrant to distrain upon his goods and effects to the amount of the rates, and the additional sum of 6*s.* for costs incurred in these proceedings. A warrant for his arrest, which recited this amount, was subsequently signed by the two defendants, and delivered to the defendant Cooper. Armed with the latter warrant, the defendant Cooper pursued the plaintiff into the city of London, where he presented the warrant to the Lord Mayor, who *backed* it. He then arrested the plaintiff, who thereupon paid the whole sum of money specified in the warrant, and obtained his liberty. The plaintiff having brought the present action against the three defendants, the question is, whether any or all of them are liable to the consequence of that arrest? That question depends chiefly upon the statutes to which our attention has been directed. In the first place, it is clear that the warrant was a bad warrant, and could have afforded no justification for the arrest of the party in the county of Sussex. The stat. 43 Eliz. c. 2, s. 4, which gives the power to levy the arrears of poor-rates by distress and sale of the defaulter's goods, and, in the event of such distress being insufficient, to commit him to the county gaol, does not mention costs; and the subsequent statute, the 18 Geo. 3, c. 19, s. 1, which does give power to award costs, does not warrant the committal of the offender until such costs shall be paid, but only for a limited period, which is not to

exceed one month. The warrant was therefore illegal in the county in which it was issued, as there is no power given by either of these statutes to enforce the payment of the costs in the manner authorised by that document. It was then contended, on the part of the magistrates, that, admitting the warrant to be bad, they were not responsible, the arrest having been made out of the county of Sussex. It therefore becomes necessary to consider the effect of "backing" the warrant. The statute which gives that authority makes it purely a ministerial act. The warrant, therefore, when "backed," was the warrant of the magistrates, and not of the Lord Mayor. The act of "backing" has no reference to the legality or illegality of the warrant, and the magistrate who backs it is not subject to any risk which may arise from its execution. I am therefore of opinion, that the defendants Woods and Smith, who issued this warrant, are responsible for the arrest made under it.

On the part of the defendant Cooper, it was contended, in the first place, that the demand of the copy and perusal of the warrant, though signed by Steele, the plaintiff's attorney, was made by his clerk, and was, therefore, insufficient; but I think that the fallacy was well pointed out by one of the learned counsel in shewing cause against the rule—that, although the clerk left the paper, yet the demand was in reality made by Steele, the plaintiff's attorney. The act of Parliament intends that party whose name is signed to the document to be the party making the demand, although it be left by another person. The demand and service, therefore, in the present case, were in accordance with the terms of the statute, and were perfectly regular. In the second place, it was contended that, inasmuch as a copy of the warrant had been obtained on behalf of the plaintiff prior to the demand upon Cooper, he was excused from giving a copy. But it does not appear that the permission to give a copy was an act to which Cooper was in any way a

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party, or such an act as could in any manner bind him. It appears that, on a subsequent occasion, a notice was served upon him, making a demand with which he did not comply; he was therefore not entitled to the protection of the statute. In the third place, it was urged, that, where the constable is sued *jointly* with the justices, upon proof of his having acted under their warrant, he is entitled to a verdict; and that the word "*and*" in the latter part of the section of the statute ought to have been "*but*," if the legislature intended the other construction; but it appears to me that that branch of the clause clearly means that such is to be the case after a demand of the copy and perusal of the warrant has been complied with by the constable—the words "such action" referring to an action brought after "a demand and compliance therewith." I am therefore of opinion that none of the objections ought to prevail. In the last place, it was urged that the verdict ought to be reduced to the sum of 6*s.* only, and that we ought to give the defendants the benefit of the amount which was rightly due from the plaintiff. But I do not see how we can escape from the position, that, if a debtor is sued by his creditors for a debt justly due, and is wrongfully arrested and is compelled to pay it by duress of such imprisonment, such amount may be recovered back by action. The warrant, in our opinion, is wholly bad, and the plaintiff was wrongfully taken under it; he is therefore entitled to recover the whole sum which he was compelled to pay by means of the arrest under the warrant. I am therefore of opinion, that these rules ought to be discharged.

ROLFE, B.—I am of the same opinion. There were two rules moved for in the present case—one on behalf of the magistrates, and the other on behalf of the constable; and I think that they ought both to be discharged. This is an action for false imprisonment. Two of the defendants are magistrates who signed and delivered a warrant

to the other defendant, Cooper, by whom it was executed. There is no doubt that the plaintiff was imprisoned by virtue of that warrant or document; and that, under that execution, he was detained until he had paid the sum alleged to be due for poor-rates and costs incurred. I am of opinion that the defendants were not justified under that instrument. I think it is clear that it is bad. The warrant authorised the arrest and committal of the defaulter to the House of Correction in the county of Sussex, until he should have paid the sum of 18*l.* 5*s.* 6*d.* If this be a larger sum than that for which the magistrates could compel payment in this manner, the warrant is altogether bad. Now, it appears that the plaintiff was not indebted in the full amount stated in the warrant for poor-rates, but that a portion of the sum was for costs. The statute of Elizabeth does not give costs. The statute of 18 Geo. 3, c. 19, by which costs are given, contains special provisions for their enforcement, but gives power to commit only for the limited period of a month, and not generally until the whole amount shall have been paid. The warrant, therefore, was bad in toto. It was contended, in the second place, that, as it was capable only of being executed in the county of Sussex, and as it was executed out of that county, it was not executed within the jurisdiction of the magistrates, and, consequently, that they are not responsible. But I do not see anything in the warrant, if it be bad, which precludes it from being executed in any other county than that in which it is originally issued. One of the incidents attached to this warrant is, that, by being indorsed in the manner required by the statute, it may be made available in any county in England; and when a magistrate issues the warrant, it must be taken that he knows the law. The indorsement is, by the express provisions of the statute, merely a ministerial act, and does not in the least degree lessen the responsibility incurred by issuing the warrant in the first instance. I therefore do not think that

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there is anything in that objection. With respect to the reduction of the damages, I should feel glad if I were able to assist the defendants in that part of the case; but, as the warrant was altogether bad, as the magistrates had no power to include the costs in it, as they have done, and as the plaintiff was under no obligation to pay the amount for which he was illegally arrested, he is entitled by law to recover back the whole sum so paid. With respect to the objections which were raised on behalf of the constable, I perfectly agree with the rest of the Court in thinking that there is nothing at all in them. It appears that a proper demand was made by the plaintiff's attorney, which was delivered by his clerk. It is clear that the demand was a proper and sufficient demand, as required by the statute; and it is equally clear that the production of the warrant on the part of the police, and not by the constable, was not a sufficient compliance with the statute, to bring him within its protection. With regard to the last point, as to the objection raised upon the 24 Geo. 2, c. 4, s. 6, I do not think there is anything in that. Under that section, I think it is plain that no action would lie against the constable separately, or against him jointly with the magistrates, after a proper demand and compliance therewith. But, in the present case, although there was a demand, there was no proper compliance with it as required by the statute. I am therefore of opinion, for these reasons, that these rules ought to be discharged.

PLATT, B.—I agree with the rest of the Court in thinking that these rules ought to be discharged. The first question raised was, whether this document was legal or not; and I agree with the rest of the Court in thinking that it is illegal and bad. It was contended that the magistrates were not liable, because the warrant was indorsed by the Lord Mayor. But I am of opinion that he was bound to do so upon his being satisfied with the genuineness of the

signatures attached to that document. It became his duty to indorse it. That act was merely a ministerial act upon his part; the effect of which was to make the city of London part of the county of Sussex, for the purposes of the execution of the warrant; but it did not relieve the magistrates who issued it from any responsibility. As to the amount of the damages, I do not see any reason which satisfies me that they ought to be reduced. What portion of the imprisonment is to be attributed to the payment of the larger or smaller sum? The law is perfectly clear, that, where a person has a sum of money extracted from his pocket by unlawful means, he is entitled to recover the whole of such amount back again. Upon the other points of the case, I entirely concur in what has been said by the rest of the Court (*a*).

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Rules discharged.

(*a*) *Alderson*, B., had left the court during the course of the argument.

SAYER v. GLOSSOP.

June 6.

ASSUMPSIT by the plaintiff, as indorsee, against the defendant, the acceptor of a bill of exchange, dated the 11th of July, 1847, payable three months after date. Plea, that at the time of the acceptance the defendant was the wife of Joseph Glossop, who is still living. Verification.—The replication traversed the plea, and upon the replication issue was taken. At the trial, before *Parke*, B., at the last Middlesex Sittings, in support of the plea, an examined copy of the register of the marriage of the defendant and one

In support of a plea of coverture, an examined copy of a register of marriage between the defendant and one J. G. was given in evidence. A witness deposed, that he knew one J. G. and his handwriting; and that the handwriting of the

J. G. in the register was that of the person whom he knew:—*Held*, that the evidence was admissible without the production of the original register.

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Joseph Glossop was produced. A witness who was called deposed that he knew one Joseph Glossop, and that he had seen him in the year 1838, when he went abroad, and had corresponded with him since, and knew his handwriting, and that he had received a letter from him on the 25th of April, 1848. The witness then stated that he had seen the signature of Joseph Glossop in the original marriage register, at Marylebone Church, and that it was the handwriting of the Joseph Glossop from whom he had received the letter, and who was then alive. It was then contended, on the part of the plaintiff, that the original register ought to be produced. The learned judge, however, thought the evidence was admissible, and the defendant had a verdict.

M^r Mahon now moved for a new trial, on the ground that the evidence was improperly admitted. The original register ought to have been produced. The jury should have had that document before them, that they might form a judgment as to the character of the handwriting. It was upon the handwriting that the question rested, whether the defendant was married to the Joseph Glossop who was alive, as stated in the plea. The original, being the best evidence of the fact, ought, therefore, to have been produced. [*Pollock*, C. B.—The party who has the custody of the document could not be compelled to produce it.] In cases of bigamy it is usual to produce the original register. [*Parke*, B.—That is not the usual practice. In the numerous cases which have come before me, I do not recollect a single case in which the original register was produced.]

POLLOCK, C. B.—We are all of opinion that this rule must be refused, on the ground, that, as the person who has the legal custody of the register is not by law compellable to produce it, the party who stands in need of the evidence which that document affords is not to suffer from its ab-

sence at the trial. The only question is, how far the jury will rely on the evidence which is offered in its stead. Suppose this case: the question being, whether a particular individual were at a particular place on a certain day, and in order to prove this a witness is called, who says, "I know that man very well; he was one of the churchwardens of our parish; and on that particular day I saw stuck up a certain notice, in his handwriting." It is then said, "Why do you not produce it?" The answer would be, that it is pasted against the wall, and therefore cannot be produced. You must therefore take the witness's account of it, as it is the best that can be obtained. Now if in point of law you cannot compel a party who has the custody of a document to produce it, there is the same reason for admitting other evidence of its contents as if its production were physically impossible.

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ROLFE, B.—I am of the same opinion, and will carry my Lord's illustration a tittle further. Suppose we heard that placards containing treasonable words were posted up, and that a witness were to say that he saw a man chalk certain words up, and that these were in the handwriting of A. B., surely that would be good evidence against A. B., as the production of the writing itself would be impossible.

PLATT, B.—I think the evidence was properly admitted, as the defendant was not legally empowered to enforce the production of the original document.

PARKE, B.—I still entertain the same opinion I did at the trial. In consequence of the great importance of preserving parochial registers in a state of security, the law allows their contents to be shewn by proper copies. That being so, you may prove the marriage between the parties by an examined copy of the register. Now, to prove the

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identity of a person, you may shew that, in consequence of a particular mark, " B," appearing upon the register, such person was present at the time the entry was made upon it. In the present case, a witness swore that he had seen the original register, and that one of the signatures to it was that of a James Glossop, whom he knew: that was evidence that this James Glossop was the person who then married the defendant. I agree, that if the defendant could have got the register, but had not done so, it would go to the admissibility of the evidence produced; for the opposite party is at a disadvantage with respect to his cross-examination on that part of the case. But it is doubtful whether this document could have been obtained, as in many cases the parties who have the custody of these instruments are unwilling to allow them to be removed, and their production cannot be enforced; and their non-production is really for the public benefit. As, therefore, the law requires the register-book to be kept in a certain place, and permits you to give evidence of its contents by an examined copy, I think you may prove the identity of the party by shewing that this mark was made in the book, and that this mark is in his handwriting.

Rule refused.

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May 31.

PRATT v. PRATT and Others.

TRESPASS.—The declaration stated, that the defendants, on &c., with force and arms, &c., broke and entered a certain dwelling-house of the plaintiff, and then in the plaintiff's occupation, situate &c., and then made a great noise and disturbance therein, and stayed and continued therein making such noise and disturbance for a long space of time, to wit, &c., and then forced and broke open, broke to pieces, and damaged divers, to wit, two windows of the plaintiff, of great value, &c.; and also, during the time aforesaid, with force and arms, seized and took divers goods and chattels of the plaintiff, to wit, &c., then found and being in the said dwelling-house, and carried away the same, and converted and disposed thereof to their own use; by means of which said several premises the plaintiff and his family were disturbed in the peaceable possession of the said dwelling-house, &c.

In trespass for breaking and entering the plaintiff's dwelling-house, and seizing, taking, and converting his goods, the conversion is mere matter of aggravation; and a plea which only justifies the seizing and taking is good on special demurrer, though it does not in its commencement except the conversion.

Third plea:—And for a further plea in this behalf, the defendants say that the said dwelling-house, in which &c., at the said time when &c., was the dwelling-house, soil, and freehold of one T. P.; whereupon the defendants, as the servants of the said T. P., and by his command, broke and entered the said dwelling-house, in which &c., at the said time when &c.; and because the goods and chattels in the declaration mentioned, and every part thereof, at the said time when &c., were and was in and upon the said dwelling-house, in which &c., incumbering the same, they, the defendants, as the servants of the said T. P., and by his command, in order to remove the said incumbrances, seized and took the goods and chattels in the declaration mentioned, and then carried the same away from and off the said dwelling-house, in which &c., to a small and convenient distance in that behalf, and there left the same for the plaintiff, as they lawfully might for the cause aforesaid; quæ sunt eadem. Verification.

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Special demurrer, assigning for cause, that the plea professes in the commencement thereof to be an answer to the whole declaration; yet that, although the declaration alleges that the defendants converted and disposed of the said goods and chattels to their own use, the plea does not state or shew any answer to that part of the declaration. Joinder in demurrer.

Pigott, in support of the demurrer.—Since the case of *Harvey v. Brydges* (a), it cannot be disputed that liberum tenementum may be pleaded to trespass for breaking a dwelling-house and carrying away goods. But this declaration charges three distinct acts of trespass in respect of the goods, viz. their seizure, their asportation, and the conversion of them to the defendants' own use. The plea, not being limited in its commencement to any particular part of the declaration, must be taken to be pleaded in bar of the whole; Reg. Gen., H. T., 4 Will. 4, r. 9; but it affords no answer to the conversion. It is true that a wrongful asportation of goods does not necessarily amount to a conversion: *Fouldes v. Willoughby* (b); but here the plea professes to justify the whole declaration, and so admits the conversion in fact. If the defendant meant to treat the conversion as mere matter of aggravation, the plea should have been confined to the other trespasses: *Earl of Manchester v. Vale* (c); and then the plaintiff would have replied the conversion: *The Six Carpenters' case* (d); *Oxley v. Watts* (e). [*Rolfe*, B.—The conversion is not of itself a trespass, but mere aggravation.] In cases of personal trespass, matter of aggravation must be justified: *Smith v. Edge* (f); *Gregory v. Hill* (g). [He also cited *Woods v. Durrant* (h).]

(a) 1 Exch. 261.

(b) 8 M. & W. 540.

(c) 1 Saund. 23 b.

(d) 8 Rep. 146 a.

(e) 1 T. R. 12.

(f) 6 T. R. 562.

(g) 8 T. R. 299.

(h) 16 M. & W. 149.

Phipson, contra.—The plea only professes to answer so much as the plaintiff is bound to justify as the gist of the action. Although, then, in terms it does not exclude the conversion, it is not in fact pleaded to it, the conversion being mere matter of aggravation. [He was then stopped by the Court.]

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POLLOCK, C. B.—We are all agreed that the plea is confined to the allegations of trespass, and that the conversion is mere aggravation.

ALDERSON, B.—The acts of trespass are the breaking into the dwelling-house and seizing and carrying away the goods. It does not follow, from the rule of H. T., 4 Will. 4, r. 9, that this plea is pleaded to those acts which are not trespasses.

ROLFE, B., and PLATT, B., concurred.

Judgment for the defendants.

MACHU v. THE LONDON AND SOUTH-WESTERN RAIL-
WAY COMPANY. June 6 & 8.

CASE.—The declaration stated, that the defendants were common carriers of goods and chattels for hire, and that

Where a common carrier enters into a sub-contract with other parties

ties with respect to goods which he has undertaken to carry, the servants employed by the latter are "servants in the employ" of the carrier, within the true meaning of the 8th section of the Carriers Act, 11 Geo. 4 & 1 Will. 4, c. 68.

A delivery-ticket issued by the defendants, a Railway Company, in respect of goods they had undertaken to carry, contained the name of T. J., described therein as a *porter*. The ticket was signed by "C. & H., agents." The goods were stolen by T. J. whilst under the care of C. & H., with whom the defendants had entered into a sub-contract for the carriage of the goods. In an action against the defendants for the loss of the goods, *quære*, whether the ticket estopped the defendants from denying that T. J. was their servant:—*Semble*, that it would not.

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the plaintiff, on &c., at the Andover-road station of the London and South-western Railway, caused to be delivered to the defendants, and that the defendants then accepted and received, a certain bale of silk, of the value of 150*l*., to be safely and securely carried and conveyed by the defendants to London, and there safely and securely to be delivered to the plaintiff, for certain reasonable reward, &c. It then charged as a breach, that the defendants, not regarding their duty in that behalf, did not nor would safely or securely carry or convey the said bale of silk to London aforesaid, nor there safely or securely deliver the same to the plaintiff; but, on the contrary, that the defendants so carelessly and negligently behaved and conducted themselves in the premises, that, by and through the carelessness, negligence, and default of the defendants, &c., the said bale of silk, &c. was wholly lost to the plaintiff. The defendants pleaded the general issue, and a traverse of the delivery of the goods, modo et formâ; and, thirdly, "that the said bale of silk in the declaration mentioned, and therein alleged to have been received by the defendants as such common carriers as aforesaid, contained only goods, and chattels, and property of a certain description, to wit, the silk in the declaration mentioned, and exceeded in value the sum of 10*l*.; and that the said bale of silk was heretofore, to wit, on &c., delivered by the plaintiff to the defendants, as common carriers by land of goods for hire, to be carried from and to the places in the declaration mentioned, at a certain office or receiving-house of the defendants for the receipt of goods to be carried by them as such common carriers as aforesaid, to wit, the said Andover-road station of the defendants; and that, before and at the time when the said bale of silk was so delivered at the said office of the defendants as aforesaid, the defendants had caused to be affixed, and there was affixed, according to the form of the statute in such case made and provided, in legible characters, in a public and conspicuous

part of the said office, a notice, whereby the defendants notified that a certain increased rate of charge therein mentioned was required to be paid over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of, amongst other things, silk exceeding the value of 10*l.*; and that, at the time of the delivery of the said bale of silk at the said office of the defendants as aforesaid, the value and nature thereof were not declared by the person sending or delivering the same, and that neither the increased charge nor any engagement to pay the same was accepted by the person receiving the said bale of silk at the office." Verification.

The plaintiff took issue upon the first and second pleas; and to the third he replied, "that, whilst the said bale of silk was in the charge and possession of the defendants as such common carriers as aforesaid, to wit, &c., the same was unlawfully and feloniously stolen, taken, and carried away by a certain then servant of the defendants, to wit, one Thomas Johnson, whereby the same was not safely and securely carried or conveyed, or delivered as aforesaid, but then was and now is wholly lost to the plaintiff by reason of the said felonious act of the said Thomas Johnson," &c. Verification. The defendants rejoined by way of traverse, "that, whilst the said bale of silk was in the charge and possession of the defendants as such common carriers &c., the same was unlawfully and feloniously stolen, &c. by a then servant of the defendants then in the employ of the defendants, modo et formâ:" upon which rejoinder the plaintiff joined issue.

At the trial of the cause, before *Pollock*, C. B., at the London Sittings after Michaelmas Term, 1847, the following facts appeared:—The action was brought by the plaintiff against the defendants to recover of them the value of a bale of silk. The plaintiff was a silk-trimming manufacturer, and carried on his business at Bunhill-row, London;

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and the bale in question had been delivered to the defendants at their office at the Andover-road station, to be carried and by them delivered to the plaintiff at his above address. The value of the bale was not declared when it was delivered to the defendants, and the ordinary charge only for the carriage of a parcel of that bulk was paid. The bale was placed in a van under the care of a person named Thomas Johnson, on the arrival of the train at the Vauxhall station of the Company. The following delivery-ticket was sent with the bale in question:—

“(114). London and South-western Railway Company.

“Southampton, Gosport, Andover, &c., every morning before eight, and afternoon before six o’clock.

“From Hambro’ Wharf, Lower Thames-street, &c.”

[Here follows a notice from the Company that they would not be liable for certain descriptions of articles, including silk, above the value of 10*l.*, unless the value thereof should be declared, and the increased charge paid, &c.]

“The delivery of goods will be considered complete when the same are unloaded out of the waggon, dray, or cart, and placed at the door of the consignee: the cellaring or warehousing them afterwards will be at the owner’s risk.

“Any servant of the Company taking more than is stated in this ticket will be dismissed.

“*Notice.*—The Company are not responsible for any parcel above the value of 10*l.*, unless declared as such at the time of booking, and entered and paid for accordingly. It is requested that any irregularity may be notified immediately to

“CORNELIUS STOVIN,

“General Manager of Traffic.

"Mr. Machu, Bunhill-row, to South-western Railway Company.

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"1846. June 16. One truss, paid on 2s.

"James Beedy, "Charles Goodwin, "William Lee, "George Clay, "Thomas Johnson, "George Fry,	}	Porters.
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"Goods conveyed to or from any part of London, by addressing a line to Mr. Ritches, at the Delivery-office, as above.

"CHAPLIN & HORNE, Agents."

The bale was stolen by Johnson on the road between the station and its destination. Johnson was in the employ of Chaplin & Horne, who were employed by the defendants to carry goods for them; but it did not appear under what precise contract they did so. It was thereupon contended by the defendants' counsel, that Johnson was not a servant of the defendants, and in their employ, within the true meaning of the 8th section of the Carriers Act, 11 Geo. 4 & 1 Will. 4, c. 68. The Lord Chief Baron, however, entertained a different opinion; and under his Lordship's direction, a verdict was entered for the plaintiff, with leave reserved to the defendants to move to enter a verdict for them on the third issue.

Martin having subsequently, in Hilary Term, obtained a rule nisi,

Sir *F. Thesiger* and *E. H. Woolrych* now shewed cause.—There are two questions in the present case. The first is, whether the defendants are not estopped by the delivery-ticket. If that should be answered in the affirmative, the

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plaintiff is entitled to succeed. If not, then comes the question, whether Johnson, who stole the silk which was intrusted to the defendants to be delivered in Bunhill-row, London, is a servant within the true meaning of the 8th section of the Carriers Act, 11 Geo. 4 & 1 Will. 4, c. 68. It is submitted that, at all events, he was a servant of the defendants within the meaning of the 8th section. The Railway Company may select whom they please to deliver the goods committed to them; and the mere fact that such person is also employed by others does not make him less the servant of the Company. He may be servant to both; but for the delivery of this silk upon this occasion Johnson was the Company's servant.—They were then stopped by the Court, who called upon

Martin and *Montague Smith* to support the rule.—With respect to the first question, it is clear that the delivery-ticket does not estop the Company. It is not signed by the Company, but by Chaplin & Horne, and does not form any part of the contract. The defendants are, therefore, not estopped from shewing that the party who had to deliver the goods, but who stole them, was not their servant. [*Pollock*, C. B.—In *Pickard v. Sears* (a), Lord Denman says that the rule of law is clear, “that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.” The principle was the same in *Gregg v. Wells* (b), and *Coles v. The Bank of England* (c).] The defendants are not estopped, for the reasons before given. It is contended also that Johnson was not a servant within the meaning of the 8th section, which provides “that nothing in this act shall be

(a) 6 Ad. & E. 469.

(b) 10 Ad. & E. 90.

(c) Id. 437.

deemed to protect any mail contractor, stage-coach proprietor, or other common carrier for hire, from liability to answer for loss or injury to any goods or articles whatsoever arising from the felonious acts of any coachman, guard, bookkeeper, porter, or other servant in his or their employ, nor to protect any such coachman, guard, bookkeeper, or other servant, from liability for any loss or injury occasioned by his or their own personal neglect or misconduct." This act was passed for the protection of carriers; and the 1st section enacts, that no mail contractor, stage-coach proprietor, or other common carrier by land for hire, shall be liable for the loss of or injury to any articles or property, of certain descriptions specified in that section, contained in any parcel or package which shall have been delivered either to be carried for hire, or to accompany the person of any passenger in any mail or stage-coach, or other public conveyance, when the value of such articles or property aforesaid, &c. shall exceed the sum of 10*l.*, unless, at the time of the delivery thereof at the office, warehouse, or receiving-house of such mail contractor, &c., or to his bookkeeper, coachman, or other servant, for the purpose of being carried &c., the value and nature of such articles or property shall have been declared by the person sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package. By the 2nd section, an increased rate of charge may be demanded upon any parcel so delivered, and a notice of such increased rates is required to be affixed in the carrier's offices or warehouses. If it were to be held that the Company are liable for this felonious act of a person as their servant, that person being the servant of third parties, the consequence would be, that one railway company would be liable for the acts of the servants of any other railway company along whose line the goods are carried. Thus, if certain goods are delivered to railway company A,

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to be delivered in some distant part of the country, and A. deliver them to railway company B., and B. to C., and so on, and the goods are stolen by Z.'s servants, A. would be liable for the loss of the property. As this act was passed for the protection of carriers, the 8th section ought to have a strict construction put upon it; and a carrier ought not to be held responsible, unless the person who steals the article be *his own* servant—i. e. a person hired and paid by him, and under his control. The relationship of master and servant ought strictly to exist between the carrier and this party. The words of the 8th section support this construction, for there the parties named are all such servants as would be in the employ of the carrier; as, for instance, "*coachman, guard, bookkeeper, porter.*" Now it is clear that Chaplin & Horne are not the *servants* of the Company; they had merely to deliver the goods under a sub-contract. If Chaplin & Horne are not the Company's servants, how can *their* servant be the Company's servant? [*Platt, B.*—The replication alleges that the goods were stolen "by a certain *then servant* of the defendants then in the *employ* of the defendants."] Such an allegation can only be supported by such a relationship as that for which the defendants contend. In the well-known case of *Laugher v. Pointer* (a), the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to a third person. The Court of King's Bench, in that case, were equally divided upon the question as to the liability of the owner of the carriage; but this Court, in *Quarman v. Burnett* (b), settled that the owner of the carriage was not liable, on the ground that the coachman was not his servant. *Abbott, C. J.*, and *Littledale, J.*, in *Laugher v. Pointer*, were of opinion that the action would not lie. *Littledale, J.*, in

(a) 5 B. & C. 547.

(b) 6 M. & W. 499.

his judgment, says, "In the present case, the question is, whether the coachman, by whose negligence the injury was occasioned, is to be considered a servant of the defendant. For the acts of a man's own domestic servants there is no doubt but the law makes him responsible; and if this accident had been occasioned by a coachman who constituted a part of the defendant's own family, there would be no doubt of the defendant's liability; and the reason is, that he is hired by the master, either personally or by those who are intrusted by the master with the hiring of servants, and he is therefore selected by the master to do the business required of him." He then proceeds to say, with respect to under-workmen, "These under-workmen then become the immediate servants of the owner, and the owner is answerable for their default in doing any acts on account of their employer. This is, however, not the case of a man employing his own immediate servants, either domestic servants or others, engaged by him to conduct any business, or employment, or occupation carried on by him: for the jobman was a person carrying on a distinct employment of his own, in which he furnished men and let out horses to hire to all such persons as chose to employ him. This coachman was not hired to the defendant; he had no power to dismiss him." This reasoning is applicable to the present case: for Chaplin & Horne carried on a distinct business, and Johnson was their servant. Again, the learned judge, in a subsequent portion of his judgment, says, "The cases referred to before Lord *Ellenborough* only shew, indeed, the owner of the horses to be liable; but, it may be said, the traveller is liable also. I think not. The coachman or postilion cannot be the servant of both. He is the servant of one *or* the other, but not the servant of one *and* the other. The law does not recognise a several liability in two principals who are unconnected." If that be so, it disposes of the argument that Johnson might be the servant of both car-

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riers. The case of *Rapson v. Cubitt* (a) points out the distinction between a sub-contractor and a servant. There the defendant, a builder, was employed by the committee of a club to execute certain alterations at the club-house, including the preparation and fixing of gas-fittings. He made a sub-contract with B., a gas-fitter, to execute this part of the work. In the course of doing it, through B.'s negligence, the gas exploded and injured the plaintiff, and it was held that the defendant was not liable for the injury he had received. *Parke*, B., in his judgment, states that "the case of *Quarman v. Burnett* has been approved of in its main principles, by the Court of Queen's Bench, in the case of *Milligan v. Wedge*" (b). Suppose an action had been brought against Chaplin & Horne, it is submitted that they would have been held liable: *Coats v. Chaplin* (c). If, therefore, Johnson was not a servant of the defendants, in their employ, within the meaning of the 8th section of the act in question, the defendants are entitled to succeed upon the traverse, which raises the question, and the rule ought to be made absolute.

POLLOCK, C. B.—I am of opinion that this rule ought to be discharged. The point which was contended for by Sir *Frederick Thesiger*, in the outset of this case, cannot prevail, namely, that the mere production of the document disposes of the question, and, by its contents, is to be taken as a holding out of the person Johnson, who stole the silk, as a servant of the Company. I do not think that is the question which we have now to dispose of. The real question is that which has been discussed by Mr. *Martin*, and at by no means greater length than its importance warranted; and I do not think he has brought less of illustration and learning to bear upon it than the occasion called for. I

(a) 9 M. & W. 710. (b) 12 Ad. & E. 737. (c) 3 Q. B. 483.

have paid great attention to the argument, and the whole matter comes to this:—It appears that Chaplin & Horne had contracted with the Railway Company to do this part of the business for them; that they were not the servants to the Company, but were its agents; and that the persons whom Chaplin & Horne employed, whom they paid, and to whom they gave orders, and had power to dismiss—these persons were still further removed from the Company, as being servants to Chaplin & Horne, and not to the Company. Then it is said by Mr. *Martin*, that the act of Parliament in question distinctly gives the Railway Company, as carriers, indemnity against responsibility from loss, unless certain conditions are complied with; that the 8th section re-imposes their common-law liability under certain circumstances only, and that, in order to bring the plaintiff within that section, he must shew that the felonious act was committed by an *actual servant* of the Company. In proceeding to put a construction upon this statute, I have allowed the fullest scope to Mr. *Martin's* argument, and I thoroughly comprehend its force. I also perfectly agree that we have no right to make an act of Parliament; that it is only our duty to construe those that are made; and that we ought to consider, not what the legislature might have done, but what they have done: and with a perfect perception of the force of the argument derived from the expressions of Mr. Justice *Littledale*, in the case of *Laugher v. Pointer*, I am still of opinion that this rule ought to be discharged. And I think it ought to be discharged upon the general ground, which I prefer to any other, that there was an employment of Johnson by the Company, leaving out of consideration, for the present, all that relates to the holding him out as a servant of the Company. Taking it that the document in question proves that, on the Company receiving this parcel in the country, it was the undertaking on their part to deliver it in London, I am of opinion that Johnson was, within the meaning of the 8th section of the

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act, a servant in their employ. A state of things perhaps altogether different from what existed at the time of the passing of the statute, has sprung up, in consequence of railroads having come more extensively into use; but the general object of the act was to give protection to carriers in respect of small parcels of great value placed under their care, without any notice of their value, thus compelling them to incur considerable risk with but little remuneration; and the legislature has effected this by requiring the value of such parcels to be declared, and an additional sum to be paid to the carrier by way of insuring their safe delivery; and nothing can be more just than such an enactment. In order, however, to guard the public against the consequences of effecting such insurance—for one consideration for the insurance is the disclosure to the carrier's servants by such notice of the value of the goods to be transmitted—the legislature, whilst it says that the carrier shall not be liable unless the article sent be insured, goes on to provide that, whether it be insured or not, the carrier shall still be liable “to answer for loss or injury to any goods or articles whatsoever arising from the felonious acts of any coachman, guard, bookkeeper, porter, or other servant in his employ.” And I am of opinion that this liability cannot be disposed of by the introduction of the term “agent,” or by giving a principal name to the employment of any one employed to discharge the duty undertaken by the carrier. In the case which was put in the course of the argument, where a carrier confines himself to receiving goods and making contracts for their carriage, and avails himself of a sub-contract to transfer to some one else the whole duty which he has undertaken to perform, I think that *all* the parties who come in under that subsequent contract, whether directly or by the sub-contract—I think that *all* the parties actually employed in doing the work which the carrier undertook to do, either by himself or by his servants, are his servants within the meaning of

the 8th section of the act in question. I therefore think that, within the meaning of this section, Chaplin and Horne were the servants of the Company;—they were employed by the Company to take these goods from the railway station, and to deliver them in Bunhill-row; and that any persons whom Chaplin and Horne employ for the same purpose are also servants of the Company for that purpose, within the meaning of the act. Although the Company could not dismiss the porters, inasmuch as the contract was made between those parties and Chaplin and Horne, and not with the Company, yet substantially they were servants in the employ of the Company, as doing what the Company had engaged to do. On the general question, therefore, which turns upon the proper construction of the act of Parliament, seeing, as I do, that this Railway Company received these goods upon an undertaking to carry them, and to deliver them in Bunhill-row, I think that everything done with respect to the carriage of the goods is to be considered as done by the servants employed by the Company, and that the substitution of any other words, such as “agent,” or “sub-contract,” cannot have the effect of taking them out of the meaning of the act. Those persons who do the act are their servants. It may be added,—for, although I do not lay much stress upon it in the grounds of my judgment, I think it right to say, if I entertained any doubt on the general question, (which I do not), that where the document which has passed between the plaintiff and the defendants describes the person who is to do the work as their servant, the inference to be drawn from that document is, that that person was at the time a servant of the Company. When it also appears, that in that ticket the plaintiff is made debtor to the Company for the carriage of the goods, and the porter who stole them is described as one of the Company’s porters, then I say that it is not competent for them to substitute another and a different name for his. I do not, however, attach much importance to this part of the

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case; for, upon the general question, I am of opinion, that whoever discharges the duty which these companies may have undertaken are to be considered, in point of law, to be their servants within the meaning of this statute. The plaintiff is, therefore, entitled to recover in this action, and this rule must be discharged.

ROLFE, B.—I am of the same opinion. The first difficulty raised in the present case proceeded on the notion that the Company, by the delivery of a ticket in which Johnson's name as a porter appeared, were either estopped, or if not so, yet that that evidence was so conclusive on the point, that no other inference could be drawn from the facts of the case. I fairly own, that, if the matter rested on this ground alone, I should have entertained very great doubt whether the plaintiff would be entitled to succeed. I think that it is clear, that the document was mere matter of evidence, and that it would not have been an estoppel. With regard to the fact of service, I think that there was abundant evidence to shew that Johnson was the servant, not of the Company, but of Chaplin and Horne. But, even if that be so, I do not think that it is material to discuss that point. I have turned the subject over in my mind much since the occasion when it was last argued, and therefore I do not decide the matter on the spur of the moment. The Company, it appears, received these goods at the Andover-road station, and undertook to deliver them at Bunhill-row in London, as common carriers; and I think that the statute must be construed, with respect to this Railway Company, as it would have been under the old system in former times. It seems that the practice of the Company was to bring the goods which were carried by them to the Vauxhall station; and, as was assumed, and we may therefore take it as proved, that they employed Chaplin and Horne to deliver these goods in different parts of London for them. Chaplin and Horne employ Johnson,

and he steals the goods. The question then arises, are the Company liable for that felonious act? They would undoubtedly be liable, unless the statute has limited their liability. The act says, that carriers shall not be liable for goods of this description unless an insurance price be paid; but then comes the 8th section, which provides, "that nothing in this act shall be deemed to protect any mail contractor, stage-coach proprietor, or other common carrier for hire, from liability to answer for loss or injury to any goods or articles whatsoever, arising from the felonious acts of any coachman, guard, bookkeeper, porter, or other servant in his or their employ." Is Johnson, then, a bookkeeper, porter, or other servant in the employ of the Company? I think he is. I admit that the question of liability, arising from the acts of servants or agents, has been a subject well considered of late years. I agree in what was said by Mr. Justice *Littledale*, in *Laugher v. Pointer*, and by this Court, in *Quarman v. Burnett*, which has been acted upon in *Rapson v. Cubitt*; but I do not think that those cases apply to the present. In those cases a wrongful act had been done by somebody, and the question was, has the party injured a remedy against some one *other* than the actual party who committed the injury? Against the actual party of course he has a remedy. The answer is, yes he has, against the master of the party who did the damage. The liability for the wrongful act originates from the relation of master and servant. That is not so here. The right against the Company arises, not from the relation of master and servant, but by virtue of a contract into which they have entered to deliver the goods. The Company defend themselves on the ground, that the person who stole the goods was not their servant. What, then, is the meaning of the word "servant," in the 8th section of the act? It has been contended, on the part of the defendants, that no one is a servant of a carrier, within the meaning of that section, unless he be actually hired,

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retained, and paid by him. I do not, however, see how such a construction can possibly be put upon that section; for it says, that "nothing in the act contained shall protect from liability from loss or injury arising from the felonious acts of any coachman, guard, bookkeeper, porter, or other servant in his employ." What is the meaning of that? The legislature felt that, having given protection to the carrier against responsibility for goods not insured, it was not necessary to say that, in the event of uninsured goods being stolen by the carrier himself, he should not be entitled to protection; but they proceed at once to speak of the felonious acts of bookkeepers or other servants in his employ. I think that a very large construction ought to be given to these words; they must be taken to mean bookkeepers, porters, or other servants actually employed to do what the carrier has undertaken to do. The legislature not only contemplated that a carrier might himself carry the goods delivered to him, but that he might hand them over to another person to carry. If they were stolen by himself, he of course would not be protected; neither do I think he would if the person whom he had employed as a substitute were to steal them. Unless that construction be adopted, this anomaly would follow. Nothing was more common, under the old system, than for the coachman to hire the guard, or the guard the coachman; and if a person had lost anything sent by a stage-coach, and had sued the proprietor, could the claimant be turned round by the proprietor saying, "I did not employ the guard or coachman?" I think, therefore, that when the legislature used the word "servant" in this section, they meant to say, the carrier being clearly liable if he steals the goods himself, and it being his ordinary duty as carrier to carry them himself, he shall equally be responsible if any other person employed under the contract steals them. I therefore think that Chaplin and Horne were servants of the Company within the meaning of the 8th section of the act of Parliament,

and that every person was so who was directly or indirectly employed by them to do what they had contracted to do by themselves or by others under them. I therefore am of opinion, that the plaintiff is entitled to succeed, and consequently that this rule ought to be discharged.

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PLATT, B.—I am of the same opinion. This statute, when considered with attention, can be very plainly expounded, and ought to be construed with reference to the duty of carriers, according to the custom of the realm. Without this statute a carrier would be liable for the safety of the goods until their arrival at their place of destination. Suppose, in this case, the goods, instead of having been stolen, had been injured by careless treatment between the railway station and the place of delivery, could there be any doubt that the carrier would, in case the goods were insured, be liable for the damage they might have received? I think there could not; and for this reason, that the carriers who drove the horses, in taking the goods from the station to their ultimate place of destination, were the agents and servants of the Company for that purpose. The form of the declaration would be, that the defendants were guilty of negligence by their servants. These porters are consequently, for some purposes, the agents of the Company; for they have entered into a contract in respect of these goods, which depends upon and refers to the contract in question. This case is totally different from that of the job-master, who drives the horses he lets out for hire by his postilion, and over the postilion the hirer of the horses has no control whatever. In every case the owner of horses or a vessel is bound to place them under such governance as shall prevent the occurrence of any injury by negligence to any of the subjects of the Queen. If any injury does occur, the master who placed the negligent person there becomes himself responsible for the injury which has been so

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done. But all these cases rest upon a totally different principle; for there the mischief is brought about by the person who drives or authorises the driver; and therefore, as regards the public, the job-master, and not the party who hires the horses, is the master of the driver. The present case arises out of a relation created by contract. A carrier undertakes to carry goods from one place to another, and then it is said, that, because the goods were stolen by a servant of a sub-contractor employed by the carrier, the carrier is not responsible. It is clear that this question is not affected by the decisions on cases of negligence, which are independent of any contract between the parties. We must therefore look to the meaning of the statute. Its meaning was this—as the great responsibility cast on carriers, without due notice of the value of goods committed to their care, operated as a great hardship upon them—for if the carrier knew that a parcel bailed to him was of great value (as, for instance, a casket of jewels) he would not leave it exposed to the hands of a thief—it was, therefore, thought just by the legislature, that the carrier should have notice of the value of the article; and that, if he had not, he need not use extraordinary care, and should not be responsible for it in case it should be lost. The means the legislature took of effecting that was by requiring the bailor to pay a premium for the additional care to be employed in the carriage of the goods. But the legislature say to the carrier, “Although we give you all this protection in that case, we will not extend it to those cases where the loss has been by felony.” That is the meaning of the 8th section; for its effect is to take out of the operation of the statute all losses occasioned by felony on the part of persons who, in case of loss, might be treated as servants of the carrier; for I say that the persons so employed are his servants within the true meaning of this section, although it is unnecessary to go to that extent in coming to a decision in the present case. I have paid the

utmost attention to the vigorous and ingenious arguments of the learned counsel for the defendants; but I still think, that, upon the construction of the statute, the matter is very plain. Any person employed by a carrier to perform the contract into which he enters, is a servant in the employ of the carrier, within the true meaning of this statute. Any other construction would be the parent of very dangerous consequences. These companies might let out every single part of their carriers' business, which is generally very extensive, to others, who might employ other servants under them. If we were to hold that such persons are not the servants of the Company, a complete immunity would be obtained from the responsibility for every single theft that might be committed from one end of their line to the other, under the pretext that the persons by whom the theft had been committed were not their servants or in their employ. It would be an exceedingly dangerous doctrine to hold, that these persons, who enjoy all the profits derived from the carriage of the goods, shall, by a sub-contract unknown to the other party, get rid of their responsibility. As to the other point, I think that the ticket produced did not operate as an estoppel, but that it was mere matter of evidence.

Rule discharged.

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A declaration in covenant set out an agreement, dated the 27th of April, 1840, whereby, after reciting that the defendant was indebted to the plaintiffs in 60*l.*, to be repaid, with interest at 5*l.* per cent., it was agreed, "that the said sum of 60*l.* shall remain in the hands of H., the defendant, from the date hereof, for one whole year; that, at the expiration of that period, (if the interest shall be then paid, and *no notice be then given* to call in the same), the 60*l.* shall continue in the hands of H. for another year, and so on from year to

year, until notice, in writing, shall be given by B. (the plaintiff) to call in the same; that twelve calendar months' notice, in writing, shall be given to call in the 60*l.*; and that, at the expiration of the said notice, the same shall be paid by instalments of 10*l.* every third month, until the whole amount be paid, the first payment of 10*l.* to be made at the expiration of fifteen months from the date of the said notice, so that the whole amount of 60*l.* shall be paid by the end of two years and six months from the date of the said notice." Averment, that notice in writing, dated the 29th of May, 1846, was served upon the defendant to call in the principal sum of 60*l.*; and that, although twelve calendar months from the date of such notice and service thereof elapsed before the commencement of the suit, and although six months from the expiration of the said twelve months had also elapsed, and although two instalments had become due, yet the defendant had not paid the same. On demurrer, *held*, (*Platt*, B., dissentiente), that, after the expiration of the first year, the notice to pay off the principal might be given at any period of the year, and that the time for payment of the instalments was to be calculated from the date of the notice, not from the day of the year corresponding with the date of the agreement.

COVENANT.—The declaration stated, that by a memorandum of agreement under seal, bearing date the 27th day of April, A.D. 1840, and made between the defendant of the one part, and the plaintiffs of the other part, (profert), after reciting that the defendant was indebted to the plaintiffs in 60*l.*, which he agreed to repay with interest at 5*l.* per cent., it was mutually agreed as follows, that is to say, "that the said sum of 60*l.* shall remain in the hands of the said J. Hartill, at and after the rate of interest aforesaid, from the day of the date hereof until the full end and term of one whole year; that at the expiration of that period, (if the interest hereinbefore mentioned shall be then paid, and *no notice be then given* to call in the same), the said sum of 60*l.* shall continue in the hands of the said J. Hartill for another year, and so on from year to year, until notice in writing shall be given by the said W. Brown, or Leah his wife, to call in the same; that twelve calendar months' notice in writing shall be given to call in the said principal sum of 60*l.*; and that, at the expiration of the said notice, the same shall be paid by instalments of 10*l.* every third month, until the whole amount be paid, the first payment of 10*l.* to be made at the expiration of fifteen months

from the date of the said notice, so that the whole amount or sum of 60*l.* shall be paid by the end of two years and six months from the date of the said notice: the interest to be paid on such amount only as shall remain unpaid."

Averment, that, at the expiration of one whole year from the date of the said memorandum of agreement, "notice in writing, bearing date the 29th of May, A.D. 1846, was served by the plaintiffs upon the defendant, to call in the principal sum of 60*l.*; and that, at the expiration of twelve calendar months from the day and year last aforesaid, the principal sum of 60*l.* would be required by the plaintiffs to be paid by instalments of 10*l.* every third month, until the whole amount thereof should be paid; and that the first payment of 10*l.* was to be made at the expiration of fifteen months from the date of the notice last aforesaid, so that the whole of the said amount or sum of 60*l.* should be paid at the end of two years and six months from the date of the said last-mentioned notice. Nevertheless, although twelve calendar months from the date of the said last-mentioned notice, and from the service thereof on the defendant, had elapsed before the commencement of this suit, and although six months from the expiration of the said twelve calendar months had also elapsed before the commencement of this suit, and although the two instalments of 10*l.* and 10*l.* of the said principal sum of 60*l.* had become due and payable from the defendant before the commencement of this suit, under and by virtue of the said memorandum of agreement and of the said notice so given thereunder as aforesaid, yet the defendant hath never at any time paid to the plaintiffs, or either of them, the said two instalments of 10*l.* and 10*l.*, or either of them, but the same still remain and are wholly due from and unpaid by the defendant."—The declaration then alleged the non-payment of the interest due on the said sum of 60*l.*

Special demurrer, assigning, amongst other causes, that it did not appear that any sufficient notice to repay the

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principal money had been given, as it did not appear that such notice had been given at the expiration of any second or subsequent year, calculated from the *date of the contract*: that, as the declaration shewed that the notice to call in the principal money was given after the expiration of the first year, the plaintiff should have made it clearly appear in his declaration, that a period of fifteen months from the time of the giving such notice had elapsed after the expiration of some second or subsequent year, calculated from the date of the alleged contract. Joinder in demurrer.

Crowder, in support of the demurrer.—The defendant contends, that, according to the true construction of this agreement, the notice, in order to be valid, must expire at the end of twelve calendar months terminating on some 27th day of April. The plaintiffs on the other hand assume, that after the expiration of the first year they might at any time give a notice, which would take effect fifteen months afterwards. The intention was, that the 60*l.* should at all events remain in the hands of the defendant from the 27th of April, 1840, until the end of one whole year; and if the interest were paid, and no notice then given, it should remain for another year, and so on from year to year. The deed, in fact, creates a quasi tenancy from year to year of this money. [*Alderson*, B.—At the end of the first year the plaintiffs might clearly have given a notice to pay the next day. But if they pass over the year by one single day, the defendant may retain the money for the whole of another year, and so on from year to year *unless* notice be given. How do you construe the words “so that the whole amount or sum of 60*l.* shall be paid by the end of two years and six months *from the date of the said notice?*” Suppose notice given a week after the expiration of the year, according to your argument, it would not take effect until the end of two years all but a week, and then there would be eighteen months more for the payment of the instalments.

How is that consistent with the provision that the whole shall be paid at the end of two years and six months from the date of the notice?] The previous words are not "if no notice *shall have been given*" to call in the same, but "if notice *be then given*," that is, given on some 27th day of April. This construction is consistent with the stipulation as to interest, which does not become due until the end of the year. [*Alderson, B.*—It may be paid at and after the rate of 5*l.* per cent. for the period during which the defendant holds the money. Your construction gives no effect to the words "from the date of the said notice."] They mean from the date of the period when the holding of the money first commenced, that is, from some 27th day of April.

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T. Jones, contra.—The declaration shews, that everything has been done which was requisite to entitle the plaintiffs to the money. The construction contended for by the defendant is at variance with the terms of the agreement. All difficulty would be removed if the words "unless notice in writing" were substituted for the words "until notice in writing."

Crowder replied.

POLLOCK, C. B.—I am of opinion that the plaintiffs are entitled to judgment. The question is, whether the notice to pay the principal sum is to expire at a period corresponding with the date of the agreement, or at any time of the year. The language of the deed is, that the money shall remain in the hands of the defendant for one whole year, and "that at the expiration of that period, if the interest hereinbefore mentioned shall be then paid, and no notice be then given to call in the same," the money shall continue in the hands of the defendant for another year. The expression "if no notice be then given" may either

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mean, "if no notice shall at that time have been given," or "if no notice shall then be given." There is considerable difficulty in saying what the parties really did mean. Then the rule of construction is, that the instrument must be construed most favourably for the parties for whose benefit it was made. The provision as to notice is, that the money "shall continue in the hands of Hartill for another year, and so on from year to year, until notice in writing shall be given by the said W. Brown, or Leah his wife, to call in the same; and that twelve calendar months' notice in writing shall be given to call in the said principal sum of 60*l.*; and that, at the expiration of the said notice, the same shall be paid by instalments of 10*l.* every third month, until the whole amount be paid, the first payment of 10*l.* to be made at the expiration of fifteen months from the date of the said notice, so that the whole amount or sum of 60*l.* shall be paid by the end of two years and six months from the date of the said notice." In order to give full effect to the words "from the date of the said notice," we must understand that the notice may be given on any day of the year, and that when it is given, the whole money must be paid within two years and six months from that date. That explains the ambiguity of the expression, "if no notice be then given," and shews its meaning to be, "if no notice shall have then been given."

ALDERSON, B.—I am of the same opinion. The instrument is capable of receiving a reasonable construction, so as to give effect to every word of it. The agreement is, that the party shall have the money for one whole year; and if at the expiration of that period the interest is paid, and no notice "be then given"—which I construe, "shall have then been given"—the party is to hold the money for another year, and so on from year to year until notice be given. But, inasmuch as the party might be put to inconvenience by notice being given in the course of any year, even on

the day or hour before the expiration of the year, a stipulation is inserted that the notice shall be of a particular length, namely, twelve months; and then the money is to be paid by instalments every third month, the first payment to be made at the expiration of fifteen months from the date of the notice. If the notice be dated on the day it is actually given, then, by the stipulation in the agreement, from that date apparent on the face of the notice, two years and a half is the period within which the whole money is to be paid. According to Mr. *Crowder's* argument, if the notice were dated on the 28th of April, the whole money would not be payable until three years and six months, wanting one day, after the date of the notice. That is a contradiction of the terms of the agreement, which require it to be paid at the end of two years and six months from the date of the notice. The true construction is, that the notice may be given at any time of the year, and the party may hold the money from year to year, until such notice be given.

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ROLFE, B.—The case has been argued as if there existed an analogy between this notice and a notice to quit; but there is no such analogy. If, indeed, any analogy is to be drawn, it is from a notice to pay off a mortgage. It is perfectly plain, that although a mortgage-deed provides for the payment of interest on the first of January and the first of July, the stipulation as to six months' notice for repayment of the principal does not mean that the notice is to be given on any particular day, but the mortgagee may give the notice at any moment of time. That is the analogy which presents itself to my mind. But we must construe the agreement according to its terms; and, on looking at it, I should feel no doubt on the subject, were it not that my Brother *Platt* entertains a different view. Suppose the stipulation as to notice, instead of coming after the previous sentence, had preceded it, the agreement would then have been, that

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the party should have the money for one whole year, and that twelve calendar months' notice in writing should be given to call in the principal sum. If it had stood there, no doubt the notice might have been given on any day. Then it is suggested that the words, "if the interest herebefore mentioned shall be then paid, and if no notice be then given to call in the same," mean, "if the interest is paid, and no notice be *on that day* given," the party may hold the money from year to year. That is a forced construction, not only inconsistent with the ordinary analogy of a mortgage deed, but involves a necessary absurdity; for, in that view, the saying that the party may hold on another year "if the interest be paid, and no notice be given," is the same thing as saying, "if the interest be paid, and notice given." But if the interest be paid, and no notice given, then he is to hold for another year, and so on from year to year; but if notice be given, the notice will regulate the repayment. It seems to me, both from the reason of the thing and the construction of the instrument, that the party is to be at liberty to give the notice at any time.

PLATT, B.—I have the misfortune to differ from my learned brethren. I do not see any analogy between the present case and that of a tenancy from year to year, or a mortgage-deed. We must look at the instrument itself, and collect therefrom its meaning. If the plaintiffs' view be correct, they would be entitled to recover these two instalments eighteen months after the date of the notice; but that depends upon the true construction of the agreement. When, then, is the notice to be given? It is evident, from the terms of the deed, that the parties considered it might be inconvenient to pay the whole amount at once, and therefore provision is made for the time which the payment should occupy. The deed states, that the defendant shall, at all events, be entitled to hold the money for one year, and he is bound to pay interest at the end of that time. There

is to be a twelve months' notice of repayment, and the first instalment is to be paid at the expiration of three months, and the whole at the end of two years and six months from the date of the notice. It therefore seems to me, on the face of the instrument, contemplated by the parties, that three years and a half should expire before the repayment of the whole; and that two years, at all events, should expire before the three months' instalments began to run. I must distrust my own judgment when I find grave opinions opposed to mine; but with all respect for those opinions, I cannot bring my mind to understand how it is consistent with the provisions of this deed, that the notice should be given at any time of the year. If, at the end of the first year, the interest is not paid, the plaintiff might recover the money; but if the interest is paid, and no notice then given, the parties would stand in precisely the same situation for another year—the whole period, in effect, continuing until the end of the second year. If the interest was not then paid, an action might be brought; but if the interest was paid, and notice given on the expiration of the second year, the whole money would be payable at the end of four years and a half from the date of the deed. At the end of the first year, if the interest was paid, and no notice given, the parties would stand in the same situation as if the deed had been executed on that day. It therefore appears to me, that the notice should be given on some 27th day of April, and from that time are dated the rights and liabilities of the parties.

Judgment for the plaintiffs.

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May 31.

GRAHAM v. INGLEBY and GLOVER.

Plea of privilege by an attorney, alleging that he was an attorney of the Court of Queen's Bench, and not an attorney of the Court of Exchequer.

Replication, that the defendant was an attorney of the Court of Exchequer; concluding to the country:—

Held bad, on special demurrer, for not concluding with a verification by the record.

DEBT for goods sold and delivered.—The defendant Glover pleaded, that, before and at the time of the commencement of the suit, he was, and from thence hitherto hath been and still is, one of the attornies of the court of our Lady the Queen, before the Queen herself, at Westminster, in the county of Middlesex; and hath prosecuted and defended, and doth still prosecute and defend, divers suits and pleas in the said court, before our Lady the Queen herself, for divers liege subjects of our said Lady the Queen, as their attorney; and that he and all others the attornies of the said court of our Lady the Queen, before the Queen herself, prosecuting and defending suits and pleas for their clients in that court, ought, by an ancient and laudable custom from time immemorial used and approved, according to the laws and customs of this realm and the liberties and privileges of the said court of our Lady the Queen, before the Queen herself, to be free and exempt from being compelled against their will, and have not nor hath any or either of them at any time or times whatsoever hitherto been used or accustomed to be compelled, to answer any plea or plaint, in any action personal, (pleas of freehold, felony, and appeals only excepted), before any justice or minister of our Lady the Queen, or other judges whomsoever, in any court whatsoever, except before the justices of our said Lady the Queen, of the said court of our said Lady the Queen, before the Queen herself, at Westminster aforesaid: that the said other defendant, Ingleby, before and at the time of the commencement of this suit, was, and from thence hitherto hath been and still is, one of the attornies of the said court of our Lady the Queen, before the Queen herself, at Westminster aforesaid; and hath prosecuted and defended, and still doth prosecute and defend, divers suits and pleas in the

same court, before our Lady the Queen, for divers other liege subjects of our said Lady the Queen, as their attorney; that, at the commencement of this action, he, the defendant Glover, was not, nor was the defendant Ingleby, nor hath either he, the defendant Glover, or the defendant Ingleby, ever been an attorney, officer, or minister of the said court of our Lady the Queen, before the Barons of her Exchequer, at Westminster: and this the defendant is ready to verify; wherefore he prays judgment, if the said court of our Lady the Queen, before the Barons of her Exchequer, at Westminster, will and ought to take cognisance of the said plea.

Replication, that, at the time of the commencement of this action, the defendant Glover was an attorney, officer, and minister of the said court of our said Lady the Queen, before the Barons of her Exchequer, at Westminster; and this the plaintiff prays may be inquired of by the country, &c.

Special demurrer, assigning for cause, that the replication ought not to have concluded to the country, but with a verification by the record. Joinder in demurrer.

Martin, in support of the demurrer.—The replication ought to have concluded with a verification by the record. The 6 & 7 Vict. c. 73, s. 2, prohibits any person from acting as an attorney, unless admitted *and enrolled*. The present case is not distinguishable from *Foster v. Cole* (a), where, on demurrer to a similar replication, the Court said, “The plaintiff should have concluded to the record, for no man can be an attorney but by the act of the Court, and that act must appear by the record; for we will not go to a jury to inquire into our own act.” *Barker v. Forrest* (b) is an authority to the same effect. This plea is according to the form given in *Chitty on Pleading* (c), but the case of

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(a) 1 Str. 76.

(b) 1 Str. 532.

(c) Vol. 3, p. 12.

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Percival v. Cooke (a) shews that the plea would be good, without the averment that the defendant is not an attorney of this court. The burthen of proof is therefore on the plaintiff, and he must shew, by the production of the roll, that the defendant is an attorney of this court. . . [Platt, B., referred to *Walford v. Fleethood* (b).]

Cowling, contra.—The replication properly concludes to the country. In the *Doctrina Placitandi*, tit. "Privilege," sec. 4, it is said, "If he pleads privilege as an attorney, he may produce his writ of privilege or admission upon record, and conclude 'as it appears by the record,' and then the defendant cannot be deemed to be an attorney: Salk. 545, Skin. 582; or he may plead it without producing it, and then it may be denied: Salk. 545." In *Rex v. Crossley* (c), which was an indictment against an attorney for perjury, Lord *Kenyon* ruled, that the book from the Master's office, wherein the names of attornies were entered, was good evidence to prove the defendant an attorney. So in *Sparling v. Haddon* (d), which was an action for libel on an attorney, it was held, that the stamp-office certificate, countersigned by a Master of the Court of Queen's Bench, was sufficient *prima facie* evidence of the fact of the plaintiff being an attorney of that court. *Percival v. Cooke* only decided that, where a defendant pleads his privilege as attorney, he need not aver that he is not an attorney of the court in which he is sued. Here, however, though both defendants are attornies of the Court of Queen's Bench, if either was an attorney of this court, the privilege would not avail: *Rastrick v. Beckwith* (e). It would, therefore, seem necessary to aver in the plea, that neither of the defendants was an attorney of this court. At all events, if the plea had omitted that allegation, the affirmative must have been

(a) 5 M. & W. 293.

(b) 14 M. & W. 449.

(c) 2 Esp. 526.

(d) 9 Bing. 11.

(e) 7 M. & G. 905.

stated by the plaintiff in his replication; and as the defendant has chosen to anticipate the plaintiff's answer, the latter is entitled to traverse the averment, concluding to the country. In *Dillon v. Harper* (a), *Holt*, C. J., says, "The difference is, if privilege of an attorney be pleaded with a writ, the defendant cannot be denied to be an attorney; if without, he may, and then a certiorari shall be awarded to certify whether he be an attorney or not." The law is stated in similar terms in *Scawen v. Garrett* (b).

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Martin, in reply.—*Scawen v. Garrett* conclusively establishes, that an attorney may plead his privilege without concluding "prout patet per recordum." *Walford v. Fleetwood* also shews, that the defendant need only allege and prove that he is an attorney of the other court, and so throw upon the plaintiff the onus of proving him to be an attorney of this court, which must be done by production of the roll. The meaning of the passage cited from the *Doctrina Placitandi* is this, that because the defendant produces to the Court their own record, it cannot be denied; but if he does not produce it, the fact of his being such attorney may be denied: such denial, however, must be verified by the record.

POLLOCK, C. B.—The cases of *Rex v. Crossley* and *Sparling v. Haddon* only establish this proposition, that when there is occasion to prove collaterally that a person is an attorney, the fact may be proved in any way in which it can be made plain to the jury. It is like proving that a party is employed in a particular capacity, by shewing that he performed the duties belonging to it. The plaintiff may have liberty to amend.

ALDERSON, B.—It appearing from the authorities, that

(a) 2 Salk. 545.

(b) 2 Ld. Raym. 1172.

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the negative averment in the plea is immaterial, the position of the parties becomes changed, and the plaintiff makes the affirmative allegation, which he is bound to prove by the roll.

ROLFE, B., and PLATT, B., concurred.

Leave to the plaintiff to amend; otherwise
 Judgment for the defendant.



May 31.

VARLEY and Others v. LEIGH.

Debt lies on an
 express cove-
 nant for pay-
 ment of a
 freehold rent
 charged on
 land conveyed
 in fee.

DEBT.—The declaration stated, that the plaintiffs, before and at the time of the commencement of this suit, were, and from thence hitherto have been, and still are, overseers of the poor of the township of Newton, in the parish of Manchester, in the county palatine of Lancaster, according to the form of the statutes &c.; that heretofore, to wit, on &c., by a certain deed or instrument in writing, then made under and by virtue of and according to the provisions of a certain act of Parliament, passed in the fifth year of the reign of King George the Fourth, intituled “An act for confirming certain leases, and a conveyance in fee of certain plots of land, allotted by an act made in the forty-second year of the reign of King George the Third, for dividing, allotting, and inclosing the common or waste situate in the manor of Newton, in the county palatine of Lancaster, to the overseers of the poor in the township of Newton, and for enabling the said overseers to sell and convey in fee other plots of land, all formerly part of the said waste, for building upon, in consideration of yearly chief or ground rents to be reserved for the same;” which said deed or instrument, sealed with the respective seals of W. Barratt,

J. Rigg, P. Lancashire, T. Lancashire, J. Wood, W. Howarth, H. Isherwood, A. Taylor, and the defendant, the plaintiffs now bring here into court, the date whereof is the day and year aforesaid, the said W. Barratt, J. Rigg, and P. Lancashire, then being the overseers of the poor of the said township of Newton, at the request and by the direction of the said H. Isherwood, T. Lancashire, J. Wood, W. Howarth, and A. Taylor, then being five of the trustees acting under and by virtue of the said first mentioned act of Parliament, for and in consideration of the rents and covenants thereafter reserved and contained, did thereby, in exercise of the powers or directions contained in the said first mentioned act, grant, bargain, sell, and convey unto the defendant, his heirs and assigns, a certain plot, piece, or parcel of land, with the appurtenances, in the said deed particularly mentioned and described, and being parcel of the plot or parcels of land mentioned and comprised in the schedule to the said first mentioned act annexed, to have and to hold the said premises, with the appurtenances, unto and to the use of him the defendant, his heirs and assigns, for ever; subject nevertheless to, and charged and chargeable with, the payment for ever thereafter to the overseers of the poor of the said township of Newton, for the time being, of the yearly chief or ground rent of 27*l.* 19*s.*, free from all taxes, charges, and deductions, payable half-yearly, on the 24th day of June and the 25th day of December in every year, and the first half-yearly payment thereof to be made on the 25th day of December then next; and also subject to and charged with such powers and remedies for and concerning the recovery thereof as were contained in the said first-mentioned act. And the defendant, for himself, his executors, &c., did thereby covenant with the said overseers and their successors, that he the defendant, and his heirs or assigns, should and would at all times thereafter duly pay to the said overseers and their successors the said yearly chief or ground rent of 27*l.* 19*s.*, at the

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times and in manner aforesaid, free from all present and future taxes, charges, rates, and assessments whatsoever, (prout patet); nevertheless, the plaintiffs in fact say, that after the making of the said deed, and whilst the plaintiffs were overseers as aforesaid, to wit, on the 24th day of June, A. D. 1847, a large sum of money, to wit, the sum of 41*l.* 18*s.* 1*d.* of the said yearly chief or ground rent, for one year and the half of another year then elapsed, became and was due and payable from the defendant to the plaintiffs, as overseers as aforesaid, and still remains in arrear, contrary to the force and effect of the said deed, and of the said covenant of the defendant; whereby an action hath accrued &c.

General demurrer, and joinder.—The defendant's point was, that debt will not lie for the arrears of a rent in fee.

Cowling, in support of the demurrer.—Debt will not lie under the circumstances stated in this declaration. It is well established, that at common law debt does not lie to recover the arrears of an annuity or freehold rent issuing out of land: *Webb v. Jiggs* (a); *Kelly v. Chubbe* (b). Here the conveyance is in fee, and the rent is reserved in fee. The question then is, whether the local act, 5 Geo. 4, c. cxxxv, enables the plaintiffs to maintain this action. That is an act for confirming certain leases, and a conveyance in fee of certain plots of land, allotted by the 42 Geo. 3, c. cvii, to the overseers of the poor of the township of Newton; and after reciting the award of the commissioners, and the leases and a conveyance in fee, and also that doubts had been entertained whether they were valid, the 17th section (c) empowers the overseers to convey the lots sold to the pur-

(a) 4 M. & S. 113.

(b) 3 B. & B. 130.

(c) Enacts, "That it shall and may be lawful to and for the overseers of the poor of the township of Newton, for the time being, and they are hereby fully authorised,

empowered, and directed, whensoever thereunto called upon or requested by the said trustees or any five or more of them, to grant, bargain, sell, and convey, the fee-simple and inheritance of and in all and every or any of the seve-

chasers in fee-simple, whenever called upon by the trustees, and gives a form of conveyance containing a covenant similar to that set forth in the declaration. The remedies for the recovery of the rent are prescribed by the 19th & 20th sections, the former of which authorises the overseers to distrain in case any of the rents shall be in arrear for twenty days, and the latter empowers them to enter and take possession, in case the rents shall be in arrear for forty days. The legislature has expressly provided those remedies, in order to obviate the difficulty arising from the rule of the common law, in respect of freehold rents.

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Crompton, contra.—First, debt lies on this covenant at common law. As a general rule, debt may be maintained on every covenant for the payment of a sum certain at a time certain. It is conceded that debt will not lie for the recovery of a freehold rent by a mere pernor of the profits, but where a rent is granted by deed containing an express covenant for payment, debt is sustainable on such contract. In *Webb v. Jiggs* there was no covenant for payment of the annuity, either express or implied, and consequently no privity of contract between the parties. *Kelly v. Chubbe* was

ral plots or parcels of land mentioned and comprised in the schedule to this act annexed, or any part or parts thereof, to the person or persons with whom the said trustees shall have so previously contracted and agreed to sell the same as aforesaid, and his, her, or their respective heirs and assigns for ever, or as he, she, or they might direct or appoint, subject to and charged and chargeable with the payment to the said overseers and their successors, for ever thereafter, of such yearly chief rent or chief rents, ground rent or ground rents, for or in re-

spect of the same, as the said trustees shall have contracted for or agreed upon in that behalf, and with such powers and remedies for the recovery thereof when in arrear, as are hereinafter contained, and also subject to such covenants, clauses, conditions, restraints, and regulations as the said trustees shall think fit to impose on such respective purchaser or purchasers and his, her, and their heirs and assigns, which conveyances may be made in the form or to the effect following," &c.

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also the case of a mere grant of a rent-charge. Secondly, debt will lie upon the statute; for it not only renders the purchaser of the fee-simple liable to the rent, but creates a privity between the parties, by means of an express covenant. Thirdly, debt lies, the 3 & 4 Will. 4, c. 27, s. 36, having abolished real actions. The reason why debt did not lie for the recovery of a rent in fee was, that the law would not suffer a real injury to be remedied by an action merely personal. That reason, however, no longer exists, and real actions being at an end, the remedy by debt necessarily arises.

POLLOCK, C. B.—We are all (a) of opinion that debt will lie. I should be prepared to adopt, if necessary, the reasoning that, now there is no remedy by action real for the recovery of a rent in fee, there ought to be a remedy by action of debt. But it is sufficient to say, that inasmuch as there is an express covenant by the defendant to pay the rent to the plaintiffs, debt will lie for its recovery.

ROLFE, B.—I concur in thinking that our judgment ought to be for the plaintiffs; but I wish to guard against being considered as having expressed an opinion that debt will lie in consequence of the 3 & 4 Will. 4, c. 27, s. 36, having abolished actions real. Such reasoning is far from satisfactory to my mind. Formerly the owner of a rent-seck had no remedy for the recovery of the rent.

Judgment for the plaintiff.

(a) *Pollock, C. B., Alderson, B., Rolfe, B., Platt, B.*

1848.

JONES v. SMITH.

June 10.

CASE.—The declaration stated, that the defendant was the owner of a stage-coach for the conveyance of persons from A. to B., and that the plaintiff was an outside passenger on the said coach; and that, by the defendant's negligent driving of the same, the plaintiff's arm had been injured. It alleged, by way of special damage, that the plaintiff was not able to pursue his profession of an attorney at Dolgelley in Merionethshire. The defendant pleaded the general issue. The venue had been changed from Middlesex to Merionethshire, and had been brought back to Middlesex, upon the plaintiff's undertaking "to give material evidence of some matter in issue in Middlesex." At the trial, before *Parke*, B., at the Middlesex sittings in the present term, the only evidence given by the plaintiff in support of that undertaking was the production of the roll of attorneys at Westminster, on which the plaintiff's name appeared. It was objected by the defendant's counsel, that this was not sufficient, but the learned judge ruled that it was, and a verdict passed for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit.

An undertaking to give material evidence of some matter in issue, arising in a particular county, is satisfied by evidence arising in that county, which bears upon the amount of damages.

Therefore, in an action for negligent driving, whereby the plaintiff was injured, and suffered loss in his business as an attorney—*Held*, that the production of the roll of attorneys in Westminster, containing the name of the plaintiff, satisfied the undertaking to give material evidence in that county.

Martin now moved accordingly.—The undertaking given by the plaintiff was not satisfied. It would be sufficient to prove that the plaintiff carried on business as an attorney, to enable him to recover in the present action, and the production of the roll was unnecessary. This matter was not a "matter in issue." The allegation of special damage in the declaration makes no difference. [*Parke*, B., referred to *Clark v. Dunsford* (a).] In that case the evidence offered

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did support a matter in issue. The question arose upon the general issue. In the case of *Greenaway v. Titchmarsh* (a), the undertaking was to give *material evidence* in the county to which the venue had been brought back. The rule here is, to give evidence of *some matter in issue*. The plaintiff is confined to his undertaking. [*Pollock*, C. B.—The whole question in the present case might depend upon the amount of damages sustained by the plaintiff by the loss of his business as an attorney. I do not see how the proof of his being an attorney, by the production of the roll, can be shut out, even if you were able to shew by some other evidence that he is an attorney. *Parke*, B.—His clients might say they were not bound to pay him unless he was in reality an attorney; that is a matter, therefore, which directly affects the quantum of damages. The evidence offered was consequently material evidence of a matter which was in issue, and the plaintiff's undertaking in that respect was satisfied.]

PER CURIAM (b).

Rule refused.

(a) 7 M. & W. 221.

(b) *Pollock*, C. B., *Parke*, B., *Alderson*, B., *Rolfe*, B.

1848.

ADAMS v. Sir THOMAS FREMANTLE, Bart., and
Others. June 6, 7.

THIS was an action of trespass, for seizing a vessel called "The Black Cat." The vessel in question had been seized in the port of London by the defendants, who were officers of customs, under the Foreign Enlistment Act, (59 Geo. 3, c. 69), for having a quantity of arms on board. The ship and everything on board had been restored to the plaintiff before the commencement of the suit, no proceedings to condemnation having been taken.

A vessel having a quantity of arms on board was seized in the port of London by the defendants, officers of customs, but was afterwards unconditionally restored. An action of trespass having been brought against the defendants for the seizure, in the Court of Common Pleas, a rule was made absolute in the first instance, on the suggestion of the Attorney-General, and without affidavit, to remove the cause into this Court.

The *Attorney-General* (June 6) moved, that the cause be removed from the Court of Common Pleas into this Court.

Greenwood shewed cause.—There are three objections to the present application:—First, it ought to be shewn upon affidavit, that the revenue of the Crown is in some way called in dispute in this action; secondly, in point of fact, this is a matter which cannot affect the revenue; and thirdly, as the vessel has been restored, it is a simple action of trespass, not against the Crown, but against the parties engaged in seizing the vessel.

First, there ought to be an affidavit. The rule is laid down in Manning's *Exchequer Practice*, p. 194, that "where the state of the pleadings sufficiently discloses the question intended to be raised, no affidavit in support of a motion to remove the proceedings seems to be necessary. In other cases an affidavit is required, from which it must appear that the matters in dispute relate to the revenue." Thus, in *The Attorney-General v. Hallett* (a), in which the plead-

(a) 15 M. & W. 97.

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ings were special, *Platt*, B., says, "It appears to me to be clear, from the pleadings in this case, that the motion of the Attorney-General ought to be successful. We find, upon the pleadings in the fourth plea, a direct assertion on the part of the defendant, of the right of the Crown, and a justification by him, under that right, of the acts which he is called upon to answer." In *Re Kingsman & Herd* (a), where the matter did not appear on the face of the proceedings, an affidavit was used. So, in *The Attorney-General v. Kingston* (b), there arose a discussion whether or not the affidavit was properly intituled. *Beningsfield v. Stratford* (c) may also be referred to. [*Parke*, B.—It is desirable that the precedents should be inspected, to see what the practice in this respect has been. We certainly always give credit to the Attorney-General; for instance, we grant a trial at bar without an affidavit.]

[The *Attorney-General* stated, that he was prepared with an affidavit; but that, as he was unwilling to waive the privilege of the Crown by using it, he would give directions for the different orders that had been granted by this Court to be examined, and that the result should be reported to the Court.]

Secondly, the revenue is not in any way affected by this action. The cases of *Bereholt v. Candy* (d) and *Bishop v. Warner* (e) are in point. [*Platt*, B.—Surely the seizure of a vessel, for a breach of the laws relating to the customs, is a matter which relates to the revenue of the Crown. The act in question, the 59 Geo. 3, c. 69, s. 7, embraces the Customs Act, for the purposes of seizure and for prosecution.] The vessel here has been restored. [*Parke*, B.—Suppose a maltster brings an action of trespass against an officer of excise for seizing his malt, and the Commissioners of Excise, from respect to the plaintiff's

(a) 1 Price, 206.

(b) 8 M. & W. 163.

(c) 8 Price, 584.

(d) Bunbury, 34.

(e) Hard. 193.

character, were to restore the malt to him, that circumstance would not affect the right of the Crown to remove the cause. In the case of *Banks v. Bennett* (a), there had been a pardon of the duties, and it was therefore contended that the case was at an end; but the Court said that the parties ought to prosecute their suit in this Court, because that matter could not appear without an examination of the whole matter.]

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The Attorney-General, contra, was not called upon.

POLLOCK, C. B.—We are all of opinion that the rule must be absolute.

PARKE, B.—This is a matter which in reality affects the Queen's revenue; because the ship, when it was engaged in the unlawful transaction, became forfeited to and part of the revenue of the Crown. If, upon information, it had been decided not to be forfeited, the case of *Bereholt v. Candy* would have applied. Suppose the Crown, as a matter of grace and favour, gives up the vessel, still the question, whether it was part of the revenue or not, is a question purely cognisable in this court. In the case I suggested, of the Commissioners of Excise, through favour to a tradesman who has the reputation for honesty, giving up to him part of the malt which had been seized, if he chooses afterwards to bring an action against the officers of excise for the seizure, that action is cognisable in this court.

ROLFE, B.—I am of the same opinion. I think the fact of the Crown having restored the vessel to the plaintiff is no more than if the vessel had been given to a third party.

(a) Hard. 103.

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If that had been done, the question would not have been affected by the proceeding.

PLATT, B., concurred.

Rule absolute.

The Attorney-General now (June 7) stated to the Court, that a search had been made from the year 1704, and that in all the cases, except that of *Cawthorne v. Campbell* (a), there had been affidavits used; but that, in the latter case, the application had been made upon the suggestion alone of the Attorney-General.

PER CURIAM (b).—We think that an affidavit is not necessary in this case, but that the order may be drawn up upon the suggestion of the Attorney-General. The case of *Cawthorne v. Campbell* is an authority against the necessity for an affidavit, and is opposed to the other cases. In that case there was no affidavit, and the existence of affidavits in the others does not necessarily lead to the conclusion that they are requisite.

(a) 1 Anst. 205, n.

(c) *Pollock, C. B., Alderson, B., Rolfe, B., and Platt, B.*

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DODGSON, Public Officer, v. SCOTT, Public Officer.
(*Cor.* PARKE, B.)

June 16.

IN this case a rule had been obtained on behalf of the plaintiff, one of the public officers of the Whitehaven Bank, calling upon one John Brooke to shew cause why an execution upon a scire facias should not issue against him, on a judgment recovered by the plaintiff against the public officer of the Newcastle Joint-stock Banking Company, the said John Brooke having been a member of that company at the time the contract was entered into, but having ceased to be so at the time the judgment was recovered.

Against this rule cause was shewn (June 15) by *Watson, Cleasby, and Willes*.

The *Attorney-General* and *Martin* were heard in support of it.

Cur. adv. vult.

PARKE, B., now (June 16) delivered his judgment.—This case, which was argued before me yesterday, I cannot help regretting that I should be called upon to decide, as it

Although, as a general rule, an application made upon defective materials cannot be repeated upon amended materials, except in cases where the affidavits are wrongly intitled, or have a defect in the jurat; yet, where a rule to issue a scire facias upon a judgment recovered against the public officer of a joint-stock banking company, had been obtained against a former member of the company, under the 7 Geo. 4, c. 46, s. 13, which rule had been afterwards enlarged, and was finally

abandoned on payment of the costs by the plaintiff, the plaintiff was held not to be precluded from coming again to the Court, for leave to issue such scire facias:—*Semble*, that the general rule, that a matter cannot be agitated twice, does not apply to the case of an application to issue a scire facias upon fresh materials.

The class of persons intended by the words, the persons "*for the time being*," in the 13th section of the stat. 7 Geo. 4, c. 46, are those persons who, at the time the execution issued, were members of the banking company. In proceeding, therefore, under that section, the proper course for a plaintiff, who has recovered judgment against the public officer of such company, to pursue, is in the first instance to issue writs against those persons who are at that time members of the company; but the plaintiff may proceed against the other classes which the statute renders liable, in case he can satisfy the Court, with a reasonable degree of certainty, that the execution previously issued would be ineffectual.

Those persons who become members of a joint-stock company after the contract sued upon was complete, and have ceased to be so before the judgment was obtained against the public officer, are not subject to any liability under the act.

It is no answer to a motion for leave to issue a scire facias, upon a judgment recovered against the public officer of a joint-stock banking company, against a person who was a member at the time that the contract was entered into in respect of which the judgment has been recovered, that such judgment was fraudulently concocted; such defence must be raised by plea, or form the subject-matter of an application to set aside the proceedings as fraudulent.

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is one which involves a very important rule of practice, and also some important questions of law arising on the construction of the statute upon which the matter depends. However, it became impossible to dispose of the matter before the full court, and I have now to pronounce my decision upon the question which comes before me, which I am happy to be able to do with the assistance of the Court upon the principal point, all of them concurring with me in opinion, that no rule of practice prevents me from entertaining this application. With regard to the other parts of the case, I shall pronounce my opinion according to the best judgment I can form upon it.

The principal point is, whether it is now competent for me to entertain this application. Upon this I have had the assistance of the other judges of this Court, and I have also conferred with some of the judges of the Court of Queen's Bench. This is an application under the stat. 7 Geo. 4, c. 46, s. 13, for permission to issue a scire facias against Mr. Brooke, who is alleged to have been a member of the banking company, here sued in the name of their public officer, at the time the contract sued upon was entered into by that company with the plaintiff. Several objections were taken to the plaintiff's right to this rule, one of which was disposed of in the course of the argument; namely, that the judgment was a judgment which was fraudulently concocted to the prejudice of the proprietors in the joint-stock bank. If there is anything in the objection, there is no doubt the defendant must avail himself of it, either in the form of a plea to this scire facias, or in the form of an application, specifically for the purpose of setting aside the proceedings as fraudulent; and I have now, therefore, to address my attention only to two other points which were moved before me. The first of these, then, is, is it competent for me to entertain this application at all, the objection being, that it has been already disposed of in such a way as, according to the established practice of this Court, to preclude any further in-

quity? Several cases were cited to shew to what extent the Courts had gone in laying down the rule, that after an application to them has been made, and has failed on account of defective materials, they will not allow any further inquiry. There is no doubt that such is the established practice of the Court of Queen's Bench, as appears from the cases which have been cited; and I presume it to be the practice of the other courts also. That practice appears not to have been first adopted, but sanctioned, by a rule of the Court of Queen's Bench, of Hilary Term, 3 Jac. 1, by which it was made highly penal, if a matter had been disposed of in the presence of both parties, to agitate the same matter again, and that upon the principle, that where there had been a judgment upon the case, it was conducive to the due administration of justice that the matter should not again be agitated. Now there can be no doubt that the courts have gone beyond that part of the rule which requires the matter to have been disposed of in the presence of the counsel of both parties, because they have held a party equally bound where the rule which he has obtained was discharged, although he himself, the counsel for the party obtaining the rule, was never heard. Many cases were cited as having been recently disposed of in the Court of Queen's Bench on the general principle I have stated: *Reg. v. Orde* (a), *Reg. v. Manchester and Leeds Railway Company* (b), *Reg. v. The Inhabitants of Barton* (c), *Reg. v. Pickles* (d), and *Reg. v. Great Western Railway Company* (e), in all of which the rule was recognised, that if there has been an application to the Court, and the matter has been disposed of by the Court, the parties will not be allowed to re-agitate the same matter. An exception indeed exists in cases where the affidavits have been wrongly intituled,

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(a) 8 Ad. & E. 420, n.

(b) Ibid. 419.

(c) 9 Dowl. P. C. 1021.

(d) 12 L. J., Q. B., 40.

(e) 5 Q. B. 597.

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or there has been a defect in the jurat. None of these cases go the length of saying, that under no circumstances can the party make an application to the Court on fresh materials, nor do I understand that the Court of Queen's Bench has so decided. To that question, however, it will not be necessary further to advert in the present case, because it does not appear upon these affidavits that any fresh materials have been obtained; and therefore the question will turn upon quite a different point, upon which I am to pronounce my judgment, and in which the rest of the Court concur. Most of the cases which have been cited are, it is to be observed, cases in which the matter is determined finally by the decision of the Court. Every one of them, indeed, is of that description, except the case of *Rex v. Bowditch (a)*, in which there was an application made for a criminal information, which was refused on the ground of there not being sufficient evidence of the defendant's handwriting; and the Court, upon a subsequent application, would not allow the plaintiff to amend the case by producing affidavits to the handwriting of the defendant. That decision went simply upon the ground, that a criminal information was an extraordinary remedy, and that, a party having taken his chance once, there was no reason why he should have a remedy given him on a second application, the law being open to him to proceed by way of indictment.

In the present case, the first question is, whether the same rule applies to a case in which the plaintiff, having obtained a rule, afterwards chooses to abandon it. A rule was obtained on the 29th of May, 1847, for leave to issue a scire facias against Mr. Brooke upon such affidavits as were then prepared. The rule was enlarged, no cause was shewn in the course of Trinity Term, and it was then further enlarged to shew cause in Michaelmas Term. In

(a) 2 Chit. Rep. 278.

the meantime, on the 7th January, 1848, the plaintiff gave notice of his intention to abandon the rule, and pay the taxed costs of it, which offer was accepted and those costs paid. Must, then, the matter be considered as having been finally disposed of by the Court? for if it has, and the plaintiff's application is to be understood as having been once refused, it will become necessary to consider the next question, namely, whether this case forms an exception to the general rule which prohibits the moving the same matter a second time. As to this latter point, I am by no means prepared to say that it does not; and in this the rest of the Court concur with me, without, however, meaning to give a binding decision upon the point; for we feel a difficulty in applying the same strict rule to an application for a writ, which is required by statute, and which is given in lieu of an action. There is no doubt that, if the plaintiff had issued a scire facias against one or more members, or several writs of scire facias, (supposing it to be competent for him to do so), in the first instance against those who were the parties "for the time being," if he had been non-suited in one of those actions of scire facias, he would have been at liberty, and without leave of the Court, to proceed again by a second scire facias, and so on, toties quoties, until the proceeding had been determined by a verdict for the plaintiff or the defendant. And this being an application to the equitable jurisdiction of the Court, to have a remedy against a second class of persons, it would be difficult to say that the Court should be so bound up by any rule, as that they would not permit a second application to be made, or a second scire facias to issue, in case the first had failed; but I agree, that in such a case it would be proper that the party applying a second time to the Court for permission, should lay before it some ground why he had failed upon the first, and shew some good reason why he should apply to the Court a second time, to make the defendant liable to a scire facias. I have before observed, that upon looking

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through the affidavits there is no explanation why the first scire facias was abandoned; and no new facts are said to have been discovered by the plaintiff, to justify him in making a second application to the Court. There is no affidavit, that at the first time the application was made they had made what they thought a sufficient inquiry, but that since, on making further inquiry, they had discovered clear evidence of the insolvency of some of the parties, whereon to justify the application to the Court on new facts. The affidavits do not contain a word of that. All I know upon the affidavits is, that in the first instance the plaintiff obtained a rule, and afterwards, for some defect or other in the affidavits (what it was does not appear), he has again applied to the Court.

The question here then is, whether, simply because the plaintiff has obtained a rule and abandoned it, under the circumstances here stated, he is to be considered as bound in the same way in which he would be bound by a decision of the Court, on the case coming before it and being disposed of. This depends entirely upon what the effect is of the plaintiff withdrawing his application. On the 7th of January, 1848, this rule having been twice enlarged, the plaintiff gave the following notice to Mr. Brooke:—"Take notice, that the plaintiff hereby abandons the rule nisi, made in this cause on the 29th of May last, whereby it is ordered, that John Brooke therein named shew cause, on Friday the 4th of June next, why a writ of scire facias on the judgment obtained by the plaintiff in this cause should not issue against him, as a member of the Newcastle Joint-stock Banking Company; and the plaintiff in like manner abandons the rules subsequently made for enlarging the said rule of the 29th of May last; and the plaintiff hereby offers to pay any costs which may have been properly incurred in consequence of the said rule, to be taxed by the Master." To that proposal Mr. Brooke accedes, and the costs of these proceedings are taxed and paid accordingly; and the question really is,

what is the bargain between the parties. Is it a bargain that they should be placed in precisely the same situation as if the rule had been brought on and disposed of by the Court, or is it an offer merely to withdraw the writ, and that the plaintiff should stand in the same situation as if that writ had not issued at all? If the latter construction is to prevail, and the party is to be in the same situation as if the rule had been disposed of by the Court, then I think the plaintiff must fail in this application, for the reasons I have mentioned; namely, that he has not shewn any satisfactory ground, upon his affidavit, why this case is different now from what it was on the 29th of May, 1847, at the time he first made the application. But if the meaning is this—“I will agree to withdraw what I have already obtained, and to stand in the same situation as if the rule is not issued, and will now at once offer to pay you the costs of that rule; but if you choose to go on, then the matter must be tried in court, and you must take your chance of succeeding or not; but I make the offer to you to abandon my application altogether, if you will consent to receive the taxed costs of it;” then the plaintiff will be at liberty to renew the application. It is really a mere question of construction upon the agreement between the parties; and, having conferred with my brother judges upon that subject, we are all of opinion that the real meaning of the contract is, that the former application was to be withdrawn, Mr. Brooke consenting to receive the costs absolutely; whereas, if the matter had gone on, in case of a refusal, the plaintiff would peradventure have succeeded; at least, he would have had his chance of succeeding.

The question then will be, whether, supposing that this was a new application to the Court, founded upon this affidavit, the plaintiff would be entitled to succeed, and whether permission ought to be given to him to issue a *scire facias* against Mr. Brooke; and the question which arises in the first instance is, whether he was a partner at the time of the

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contract entered into. I do not trouble myself with that part of the affidavits which disputes that fact, because that is a matter which must be tried upon the plea to the scire facias; but I direct my attention to the other facts of the case, many of which, it is very properly argued, if not all, could not be questioned upon any issue to the writ of scire facias; and therefore I must take care, to the best of my ability, to be right in forming my judgment upon them. Now the objections which are made to the issuing of this scire facias are, first, that the plaintiff has not taken the proper steps in the first instance, by issuing a scire facias against the proper persons primarily liable; and secondly, that, supposing the plaintiff has done that, then upon these affidavits there is no sufficient case made out for the interference of the Court in granting this scire facias against the party to the contract, because other writs of scire facias have been sued out against other parties, and that it is yet undetermined that the result of them will be fruitless.

The first and important question in the case, which I very much regret that I should have for the first time to determine, although there are dicta upon the subject, and a prevalent opinion respecting it, is, what class of persons are meant to be designated by the statute under the description of persons "for the time being." It cannot be denied that this statute is very inartificially framed, and I have no doubt that the person who prepared the 13th clause had in his mind an idea which the recent decisions shew was erroneous. There is no doubt but that the framer of that clause supposed, that as soon as a judgment was obtained against the nominal defendant, the public officer, it would be competent to the plaintiff to issue immediately execution against those persons who were partners in the concern, and that there need not previously be a suggestion upon the record, or a writ of scire facias, or any other proceeding. In that respect he was wrong, because it was decided in Ireland, that you could not make a

person liable who was not made a party to the record by some proceeding or other; and in the case of *Barton v. Hunter* (a), before *Bushe*, C. J., the course approved was, that there should be a suggestion on the record, that being thought to be the proper technical mode of introducing facts upon the record which did not appear upon the record before. In the case of *Bartlett v. Pentland* (b) the Court of Queen's Bench concurred in opinion with the Irish Court, that it was not competent for the plaintiff to issue a process of execution against a person who did not upon the record appear to be a party to the judgment, the Court intimating that a suggestion was the proper mode of making him a party to the record. It was subsequently, however, considered, and very properly, that this was not the technical mode of proceeding, but that the proper mode was by issuing a scire facias against the persons who were partners at the time, to give them an opportunity of pleading to the scire facias that they were not partners, and if they were, then they would properly become liable to the judgment on the record: *Bosanquet v. Ransford* (c), *Cross v. Law* (d), *Whittenburg v. Law* (e), *Harwood v. Law* (f), *Clowes v. Brettell* (g). Now I think it cannot be denied that the class of persons who must have been liable to an execution in the first instance, if the notion of the framers of the act had been carried into effect, is the same class that must now be proceeded against by scire facias in the first instance. It is impossible to see who would be partners at the time of issuing the actual execution; and no other date, therefore, can be assigned as the time of their being partners, than the issuing of the scire facias. That is the beginning of the execution. I think that is a matter which does not admit of the least doubt; and the question is, what is the class of persons who are to be liable according to the terms of this

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(a) 8 Hud. & Br. Ir. Rep. 569.

(b) 1 B. & Ad. 704.

(c) 12 Ad. & E. 813.

(d) 6 M. & W. 217.

(e) 6 Bing. N. C. 345.

(f) 7 M. & W. 203.

(g) 10 M. & W. 506.

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clause? Now it is a good rule to go by in the interpretation of a statute, to act upon its grammatical construction, unless it leads to some incongruity or manifest absurdity. The words of the clause are, "execution upon any judgment obtained against any public officer, for the time being, of any such corporation or copartnership carrying on the business of banking, under the provisions of this act, whether as plaintiff or defendant, may be issued against any member or members, *for the time being*, of such corporation or copartnership." What is the grammatical construction of the words "for the time being?" Surely they mean for the time being of the act with respect to which it is spoken; this must, therefore, be an execution against the persons who, at the time of the execution, were members of the banking company. That is, undoubtedly, the grammatical meaning of the terms "for the time being," to whatever subject they apply, or to whatever act they apply. The legislature is considered as speaking of persons who fill a particular character at the time of the act about to be done, unless it can be shewn by the context that there was clearly a different meaning to be put on the words. Mr. *Cleasby*, in a very able argument, suggested that the context shewed this, and that there would be a great hardship in making persons liable upon contracts, who were not liable at the time of the contract made; and that the proper meaning of the terms "for the time being" must be persons who were members of the company at the time of the commencement of the original action; that, as I have said before, is surely not the grammatical construction of the words; and besides, it would let in an absurdity as great, or nearly so, as any which would follow from using the terms in their ordinary grammatical sense; because it makes persons liable at the commencement of the action, who were not liable at the time of the contract made. It is quite impossible, looking at this act of Parliament, to say that the legislature meant to restrict the creditor to the common law liability of the debtors; for the statute really made three other classes of persons liable,

besides those who are liable by the common law. It makes, in the first place, those liable who were parties at the time of the execution; and then, in failure of these, those who were members of such copartnership at the time the contract or agreement on which such judgment was obtained was entered into. This is the common law liability; but the statute does not confine the remedy to persons who were partners at that time, for it goes on to extend it to those who become members "at any time before such contract was executed;" so that, in the case of executory contracts, those are liable who are partners at the time of the execution of the contract, and they were not liable at common law. And in the next place, it makes those liable who were members "at the time of the judgment obtained:" and these also are not liable at common law. It is therefore perfectly clear, that this statute means to impose some additional liability beyond that which the common law imposed on the members of these copartnerships. I think there is no doubt that the object of the legislature was to accomplish a thing which it is very difficult to accomplish; namely, to treat these bodies as corporations, as to the mode of suing them; and further not to confine the remedy of the creditor to the partnership property, but to make each individual partner personally responsible for the debts of the partnership. The object of the legislature in allowing execution to be taken out against persons who were not liable as contracting parties, and also against those in the second degree, who were partners at the time of the contract executed or judgment obtained, and not at the time of the contract made, was upon the supposition that these persons had all the means of applying the funds of the society, and ought to have applied them, to the payment of the partnership debts; and probably they considered, that persons who were actual members at the time the execution issued, and when the debt, therefore, ought to be paid, are the persons who, in the first instance, ought to be looked to, to take care that the partnership funds were applied to the payment of the debt;

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and that, if they do not choose to apply them, or have not the means of applying them, they should be responsible in their own persons for its due payment. That seems to be the principle upon which the legislature acted: a principle of some harshness towards those who were not members when the contract was made; but then there is no doubt, as the Attorney-General has observed, that this act was framed upon the supposition that these companies would be always solvent, and would have funds with which to meet their debts. If that be the correct view, the effect is, to make those who are partners at the time the execution issues, liable; and then, in the event of an execution against them being unsuccessful, the remedy is to be taken against those who were partners at the time of the contract; against those who were so at the time of the contract being completed; and against those who were so at the time of the judgment being obtained. It is to be observed, that the legislature has let slip one class of persons, whether intentionally or not I do not know, namely, those who have become partners after the contract was completed, and have ceased to be so before judgment obtained, although they were partners at the time the action was commenced. That case the legislature did not provide for, and these persons are certainly exempt, for there are no words to embrace them. My opinion therefore is, that in this instance the plaintiff, by taking his remedy, by issuing writs of scire facias against the existing members of the company (I mean those existing at the time the scire facias was obtained), has pursued the proper course, and that he was not bound to take out any scire facias, and would have been wrong to have taken out any scire facias, against those who were partners at the time that the action was commenced.

I come, therefore, to the last question, whether or not the plaintiff has entitled himself to this interference of the Court, by the steps which he has taken against those different persons who were members for the time being. Now, the affidavits state, that there are a great number

of persons who were partners in this concern, against whom it would be undoubtedly hopeless to take any proceedings. Seven writs of scire facias have been issued, which promise a result of about 130*l.* altogether. But then it is said that there are two persons against whom no effectual steps have been taken in order to make them responsible, and against whom proceedings might be taken with effect. Against one a scire facias issued; and it is objected, that the present proceeding ought not to be allowed until that writ has come to its determination, and been finally disposed of. Now, if I am satisfied that that writ would produce no result whatever, or no result worth the expense of proceeding in it, then the pendency of such scire facias is no answer to this application; and I take it that is the principle of the case (*a*) which was referred to as lately decided in the Court of Common Pleas, in which *Wilde*, C. J., seems to have thought at first, that you must issue a scire facias against every individual member for the time being, before you can apply to the Court for its interference against a person who was a member at the time of the contract made. That opinion was overruled by the rest of the Court, who thought it was enough if they were satisfied that every reasonable and proper effort had been made for the purpose of obtaining payment of the debt due to the creditors, by recourse to those who were primarily liable. That is the rule upon which I think I must act in the present case; and, referring to the affidavits in the first place, with regard to the persons against whom the scire facias is pending, it appears to me that, looking to the affidavits on both sides, there appears to be no reasonable ground of expectation that anything will be obtained from the scire facias. The defendant there, it appears, was the promoter, and was a trustee for a Scotch insurance office, and he accepted the shares as such trustee. I think it is impossible to make the partners in the Scotch insurance office liable through his

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(*a*) 16 L. J., C. P., 203.

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instrumentality directly; but then it is said, that if he were to pay the amount, he would have his remedy in equity against the cestuis que trust; and supposing that was not so, still, if he were sued, and the scire facias were pursued to execution, the probability is, that the members of the Scotch company would not leave him to pay the debt, but would come forward upon a principle of honour, and discharge him. I think that is rather too remote a contingency for me to say that any good result can reasonably be expected to be produced from that scire facias, unless the defendant is himself a person in solvent circumstances. Now the affidavits on the part of the plaintiff shew, that he is not a man likely to pay any reasonable portion, or indeed anything, of the considerable debt which is in dispute in this action, while the affidavits on the other side, although they say that he is apparently carrying on business, do not remove that impression from my mind. The same also may be said with regard to the other individual, who is stated to be a person possessed of considerable property. The affidavits on the other side say that the property is greatly incumbered by mortgage beyond its real value, and that therefore any proceeding against him must be hopeless. I therefore think, that in this case the plaintiff has done what the majority in the Court of Common Pleas, and ultimately, I believe, my Lord Chief Justice *Wilde*, said was necessary in such a case. A similar rule, I think, was previously laid down in the Court of Queen's Bench, (see *Eardley v. Law* (a) and *Harvey v. Scott* (b)). The rule is, that all that is requisite in this case is, that a scire facias should issue against an existing member or members, and that there should be a reasonable certainty that all remedies against that class would be ineffectual. I am satisfied of this, and therefore the rule must go.

Rule absolute.

(a) 12 Ad. & E. 802.

(b) 17 L. J., Q. B., 9.

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June 5.

DEBT on an indenture dated the 2nd July, 1829, whereby the defendant covenanted to pay the plaintiff 500*l.* and interest, on the 22nd of January, 1830.—Breach, non-payment.

A defendant cannot set off, by plea to the further maintenance of the action, a debt which accrued after action brought, and before plea pleaded.

Plea.—The defendant, as to the said debt and all damages by the plaintiffs sustained by reason of the non-payment thereof, other than and except the plaintiff's costs and charges by him about his suit in this behalf expended, says, that the plaintiff ought not further to maintain his action thereof against the defendant; because he says, that after the commencement of this suit, and before the time of the pleading of this plea, to wit, on &c., he the plaintiff became and was, and still is, indebted to the defendant in 500*l.*, for money since the commencement of this suit, and before the pleading of this plea, to wit, on &c., paid by the defendant, for the use of the plaintiff, at his the plaintiff's request; which said money, so due and owing from the plaintiff to the defendant, exceeds the debt in the declaration mentioned, and all damages by the plaintiff sustained by reason of the non-payment thereof, other than and except the said costs and charges; and which said sum of money so due and owing from the plaintiff to the defendant, he the defendant is ready and willing, and hereby offers to set off, &c.

Special demurrer, assigning for causes, that the plea does not shew that the debt attempted to be set off was due to the defendant at the time of the commencement of this suit; and that it appears by the plea, that the debt became due after the commencement of this suit; and that, by law, a debt becoming due after the commencement of an action, cannot be set off in such action. Joinder in demurrer.

Butt, in support of the demurrer.—A debt which did not exist at the commencement of the suit cannot be made

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the subject of a set-off. That is evident from the language of the 2 Geo. 2, c. 22, s. 13, (a), and it is consistent with the law and invariable practice ever since that statute passed. Before the new rules, the subject-matter of set-off might either have been given in evidence under the general issue or pleaded in bar; which shews that the statute was intended to apply only to debts existing at the commencement of the suit: for no defence is open under the general issue, which is not available at the time of action brought. [*Platt*, B.—Unless a set-off can be pleaded *puis darrein continuance*, it is difficult to see how this plea can be good.] *Evans v. Prosser* (b) expressly decided that a plea of set-off, stating that the defendant was indebted to the plaintiff *at the time of plea pleaded*, is bad. There the objection arose on general demurrer; and if the plea had been good in substance, its commencement would have been immaterial, for the Court would *ex officio* give such judgment as appeared upon the whole record proper: *Le Bret v. Papillon* (c). The term “pleading in bar” is well understood to mean “in bar of the whole action.” *Braithwaite v. Coleman* (d), and *Rogerson v. Ladbroke* (e), are also authorities to shew that debts due at the time of action brought can alone form the subject of a set-off.

(a) Enacts, “That where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set off against the other, and such matter may be given in evidence upon the general issue, or pleading in bar, as the nature of the case shall require, so as, at the time of his pleading the general issue,

where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence upon such general issue.”

(b) 3 T. R. 186.

(c) 4 East, 502.

(d) 4 Nev. & Man. 654.

(e) 1 Bing. 93.

Phipson, contra.—It is conceded that there is no precedent for such a plea; the Court will therefore determine the question on the words of the statute, which is a remedial and beneficial law, and ought therefore to be construed liberally. It first requires that there should be “mutual debts” (which condition is here fulfilled), but there are no words to shew that the debts must exist at any particular time. It then proceeds to enact, that “one debt may be set off against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require.” These words are sufficient to embrace all pleadings in bar, whether of the whole action, or merely of the further maintenance of it. In *Le Bret v. Papillon* (a), Lord *Ellenborough* says, “A matter may be pleaded in bar, and yet go only to the *further maintenance*, and not to the commencement of the action.” A case of *Sullivan v. Montague* (b) is there cited, where it was held, that matter of defence arising after action brought, but before plea pleaded, might be given in evidence under the general issue. [*Alderson*, B.—Notice could not be given of a debt which did not exist at the time of action brought, which shews that the statute provides for such debts only.] The words, “as the nature of the case shall require,” apply to cases where there might be a good plea in bar, though the set-off was inadmissible under the general issue. [He also referred to 8 Geo. 2, c. 24.]

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POLLOCK, C. B.—The novelty of the plea is supported by no precedent, and there is nothing to warrant us in so construing the statute, as to enable a defendant to set off a debt which has arisen since the commencement of the action.

ALDERSON, B.—This case must have occurred over and

(a) 4 East, 502.

(b) Dougl. 106.

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over again, and would have found its way into the books, but that every one must have supposed that there could be no doubt upon the subject.

ROLFE, B., and PLATT, B., concurred.

Judgment for the plaintiff.

June 13.

BUTLER v. CORNEY.

A defendant, who seeks by suggestion to deprive the plaintiff of costs, under the 9 & 10 Vict. c. 95. s. 129, need not, in his affidavit in support of the motion to enter such suggestion, negative any grounds for refusing the suggestion, which are not mentioned in these sections. A *prima facie* case on the part of the defendant is sufficient to entitle him to enter a suggestion.

The Court allowed a suggestion to be entered, although part of the cause of action arose on a bill of exchange, and the Court expressed a doubt whether such matter was within the jurisdiction of the County Court.

IN this case a rule had been obtained, calling on the plaintiff to shew cause why the defendant should not be at liberty to enter a suggestion on the roll, to deprive the plaintiff of his costs, under the County Court Act, 9 & 10 Vict. c. 95, s. 129.

The affidavits stated that the action was on a contract, and for a cause for which a plaint might be levied in the county court; that the plaintiff recovered only 19*l*. 5*s*.; that the plaintiff and defendant dwelt within twenty miles of each other at the time the action commenced; and that neither party was an officer of the court. Against this rule

Needham shewed cause.—The defendant's affidavit is insufficient. The 128th section enacts, that "all actions and proceedings which, before the passing of this act, might have been brought in any of her Majesty's superior courts of record, where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought, or where any officer of the county court shall be a party, except in respect to any claim to any goods and chattels taken in execution of the process of the court, or the proceeds or value thereof, may be brought and determined in any

such superior court, at the election of the party suing or proceeding, as if this act had not been passed." And the following section enacts, that "if any action shall be commenced after the passing of this act, in any of her Majesty's superior courts of record, for any cause other than those lastly hereinbefore specified, for which a plaint might have been entered in any court holden under this act, and a verdict shall be found for the plaintiff for a sum less than 20*l*., if the said action is founded on contract, or less than 5*l*. if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs; and if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client, unless in either case the judge who shall try the cause shall certify on the back of the record, that the action was fit to be brought in such superior court." The affidavit does not negative the fact of the plaintiff being an attorney, for an attorney may still sue in a superior court without losing his costs: *Jones v. Brown* (a). It has been decided, that the defendant is bound to shew that the plaintiff is not an officer of the county court. [*Parke, B.*—Such a person is expressly within the words of the 128th section.] The 58th section enacts, that "all pleas of personal actions where the debt or damage claimed is not more than 20*l*., whether on balance of account or otherwise, may be holden in the county court, without writ; and all such actions brought in the said court shall be heard and determined in a summary way in a court constituted under this act, and according to the provisions of this act: *provided* always, that the court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, shall be in question, or in which the validity of any demise, bequest, or limitation, under any will or settlement, may be disputed, or for any malicious

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(a) Ante, p. 329.

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prosecution, or for any libel or slander, or for criminal conversation, or for seduction, or breach of promise of marriage." The affidavit does not sufficiently shew that the contract was not within the excepted cases in that section. It may be that the cause of action was for a breach of promise of marriage, or in respect of a market or toll; in which case the plaintiff would be entitled to his costs. [*Parke*, B.—The question is, whether the defendant does not sufficiently bring himself within the 128th and 129th sections, so as to entitle himself to enter a suggestion to deprive the plaintiff of his costs. He need not negative the fact of the plaintiff being an attorney, or state that the case is not within the exceptions contained in the 58th section; if he *prima facie* brings himself within the 128th and 129th sections, it is sufficient, and the onus of proving those other matters is cast upon the plaintiff. *Rolfe*, B.—In the case where the plaintiff is an attorney, it is the party's legal right to sue in a superior court.] In the next place, part of the cause of action arose on a bill of exchange, and it is a matter of grave doubt whether actions upon such instruments are within the jurisdiction of the county courts. It would seem that they are not within the act. The cause of action upon a bill of exchange cannot be said to arise within any particular jurisdiction. The cases upon this point are collected in *Mondel v. Steel* (a). [*Pollock*, C. B.—If that question were raised, it would be very inconvenient to try it upon a motion like the present. *Rolfe*, B.—The plaintiff may plead to the suggestion, which will give him an opportunity of trying that question. *Parke*, B.—The preliminary question now before us is, whether the defendant is to be at liberty to enter a suggestion. It has been said, that the Chief Justice of the Common Pleas, and my brother *Maule*, have expressed a doubt whether an action on a bill of exchange is within the juris-

(a) 8 M. & W. 640.

diction of the county court. The question is one of much importance, and I should like to hear the grounds of that doubt, if it has been raised. *Alderson, B.*—The words of the 128th section are, “where the cause of action did not arise wholly, or in some material point, within the jurisdiction.” Is not the meaning of that section, that the superior court shall not have concurrent jurisdiction where the cause of action arises, in some material point, within the jurisdiction of the county court? It is perfectly clear that bills and notes are within the first part of the 58th section; and then comes the question, whether the 128th section takes them out of the jurisdiction of the county court.]

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Manisty, contra.—The county court has jurisdiction where the action is brought upon a bill of exchange; but, independently of that, the affidavit shews, that a portion of the cause of action arose not upon the bill, but for goods sold and delivered; that is, that a material part of the cause of action arose within the jurisdiction of the county court. [*Alderson, B.*—May not the 128th section mean, “if no material part of the cause of action arises out of the jurisdiction,” instead of meaning, as I first thought, “if any material part arises within it?”] It is difficult to say what is the true construction of that section. The superior courts are to have concurrent jurisdiction where the cause of action, in some material point, did not arise within the jurisdiction of the inferior court.

POLLOCK, C. B.—I am of opinion that this rule ought to be made absolute. I am not going at present to offer any opinion upon the doubt which has been suggested, whether the superior courts have concurrent jurisdiction with the county courts over actions brought upon bills of exchange for less than 20*l.* That is not the question now before us. It is sufficient to say, that the defendant applies for a suggestion to deprive the plaintiff of his costs, and un-

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less the opposition to that application be successfully made, we cannot deprive the defendant of that right. It is enough to say, that no good reason has been given to induce us not to grant it. The question raised under the act is, at all events, so doubtful a one, that we feel ourselves justified in allowing this application. By doing so, we do not decide anything upon this motion. The plaintiff may demur to or traverse the suggestion. If we were to refuse it, we should decide the matter conclusively. If, therefore, the point is doubtful, it is our duty to enable the defendant to raise it upon the record.

ALDERSON, B.—I am of the same opinion, and think that this rule ought to be made absolute. I must say that I still entertain doubts as to the proper construction of the 128th section.

ROLFE, B.—I am of the same opinion. I still think, as I did in the outset of the case, that the most convenient way of trying the matter is by entering a suggestion in the first instance. It is a very inconvenient course to try the merits upon affidavits; although the defendant cannot enter a suggestion without leave of the Court, that becomes necessary, I should conceive, because he is not the party who has the custody of the record. If he makes out a *prima facie* case, he is entitled, almost as a matter of right, to enter a suggestion.

Rule absolute.

PARKE, B., had left the court during the argument.

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June 7.

BRYANT *v.* WARDELL and Others.

TROVER for theatrical dresses and other property.—Pleas, not guilty, and not possessed; upon which issue was joined. At the trial of the cause, before *Parke*, B., at the Middlesex sittings in the present term, it appeared that the plaintiff and the defendants, in the year 1845, with a view to the exhibition of a dwarf of the name of Richard Garnsey, entered into the following agreement:—"Memorandum of agreement made the 29th of December, 1845, between W. Bryant of the one part, and R. Wardell, N. Dormer, and T. R. Lewis of the other part. For the considerations hereinafter mentioned, the said W. B. hereby agrees to permit and allow R. Garnsey, otherwise called "the miniature John Bull," to be publicly exhibited by the said R. W., N. D., and T. R. L., for twelve calendar months from the date hereof, either in London or within eighty miles thereof; and the said R. W., N. D., and T. R. L. shall have the exclusive control of such exhibition, and of the arrangement connected therewith; and they hereby agree to bear and pay all the expenses whatever, which may be in any way incurred in connection with such exhibition. That the said R. W., N. D., and T. R. L., shall retain, receive, and be paid three-fourths of the clear profits arising from the said exhibition, and the said W. B. shall receive or be paid the remaining one-fourth of such profits. That this agreement shall continue and remain in full force for twelve calendar months certain; and in case the said R. W., N. D., and T. R. L., shall be desirous, at the expiration of such term, to continue the same for six calendar months longer, they shall be at liberty to do so; and in that case, the said W. B. shall, during such six calendar months, receive and be paid one-half of the profits arising from the said exhibition, instead of one-fourth. That James Garnsey, the father of the said R. G., shall be employed by the

Under an agreement between the plaintiff and the defendants, that one C. D. should be employed by the "said parties hereto" for a certain time, and the plaintiff should be employed for a certain time also; and "that the said parties hereto" should be allowed to have the use of certain property for a certain period, and at the expiration of the agreement, the property should be given up to the plaintiff:—

Held, that the words the "said parties hereto" meant the defendants only, and, therefore, that the plaintiff was not a partner with the defendants in the goods.

The goods having been, during the term, applied by the defendants to a purpose in contravention of the agreement, and not having been redelivered by them at the end of the term:—

Held, that the bailment had been determined, and that the plaintiff might maintain trover.

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said parties hereto, at a salary of 15*s.* per week for twelve calendar months certain, provided this agreement shall remain in full force, and for such further time as such exhibition shall be continued, such salary to be considered as part of the expenses of the said exhibition. That the sum of 30*s.* per week shall be paid to the said J. G. and his wife, for twelve calendar months certain, or for such other or further time as such exhibition shall be continued: such payments shall be considered and form part of the expenses thereof. That A. Whitwham shall be employed by the said parties hereto, for the first six weeks of the said exhibition, and the said W. B. shall be employed for three months next after the expiration of the said six weeks; and afterwards, the said A. W. and W. B. shall be employed alternately, so long as such exhibition shall be continued. That the said parties hereto are to be allowed to have the use of certain property and dresses during the said exhibition, and at the expiration of this agreement such property and dresses are to be given up to the said W. B. That the said W. B. or A. W. shall be at liberty to act as check-taker at such exhibition, or to appoint a person for such purpose at their own expense. That the said N. D. having, on the 27th day of December instant, advanced and paid the said W. B. the sum of 40*l.* for the use of the said property and dresses, such sum of 40*l.* is to be repaid to the said N. D. out of the first profits of the said exhibition. That the expenses of and connected with the said exhibition shall commence this day. That the accounts of and relating to such exhibition shall be settled, and the balance and the profits ascertained and divided between the parties hereto, every fortnight." After this agreement had been entered into, the property in question was disposed of in a different way, but the jury found a verdict for the stage and scenery only, which, at the end of the term, were not delivered, but, during the term, were taken to pieces and applied—and this the jury found to have been done by all the defendants—in constructing a different sort of stage at a different

exhibition. It was objected by the defendants' counsel, that the plaintiff and defendants were partners under the terms of the agreement; and secondly, that the plaintiff had not, at the time of the conversion, such a property in the goods as would maintain the action. The learned judge, however, was of a contrary opinion, and the plaintiff had a verdict.

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Ogle now moved for a new trial, on the ground of misdirection. By the terms of this agreement, the plaintiff only transferred a portion of his interest in the property, and there was a partnership in it between the plaintiff and defendants. The profits which might arise from the speculation were to be divided amongst all the parties, including the plaintiff. James Garnsey was to be employed by "the said parties thereto," which means all the parties. So was Whitwham. [*Parke, B.*—It seems to me now, as it did at the trial, that, by the terms of the agreement, the plaintiff demised the property to the three defendants for a year certain, and that they alone were to have the use of it for that period. *Platt, B.*—The words "the said parties hereto" mean the three defendants, who are to give up the property and dresses to Bryant at the expiration of the agreement.] In the next place, the plaintiff had not such a property at the time of the conversion, as entitled him to maintain this action: *Gordon v. Harper* (a). The plaintiff might have proceeded for a breach of the agreement; but this is not the proper form of action. [*Parke, B.*—There are authorities against your position. If you lend a person a flock of sheep, and he kills them, you may have an action on the case for this conversion (b).]

POLLOCK, C. B.—We are all of opinion that there ought to be no rule in this case. In the first place, we think that

(a) 7 T. R. 9.

(b) Litt. s. 71.

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the construction which was put upon the contract at the trial, is correct. It is clear, from several parts of the agreement, that the words "the said parties" mean parties *other* than Bryant. For in one part of it there is a statement, that "Whitwham shall be employed by the said parties" for a certain time, and "the said *W. Bryant* shall be employed" for another period. Now it is clear that Bryant was not to be employed by himself, but by the three defendants. And in the succeeding clause the same words, *the said parties*, must mean the three defendants. There was, therefore, no partnership between the plaintiff and defendants in the property in question. As to the other point, we are clearly of opinion that trover is the proper form of action here, notwithstanding the continuance of the contract under which the goods had been bailed to the defendants. The case of *Cooper v. Willomatt* (a) is a decisive authority upon this point. It was there held, that a bailee of goods for hire, by selling them, determines the bailment; and the bailor may maintain trover against the purchaser, though the purchase was *bonâ fide*. The cases on the subject are referred to there. The rule is, that where there has been a misuser of the thing lent, as by its destruction, or otherwise, there is an end of the bailment, and the action for trover is maintainable for the conversion.

PARKE, B., ROLFE, B., PLATT, B., concurred.

Rule refused (b).

(a) 1 C. B. 672.

(b) See *Farrant v. Thompson*, 5 B. & Ald. 826.

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BOUGUEREAU v. BRETT.

June 8.

WADE had obtained a rule, calling on the defendant to shew cause why the demurrer to the plaintiff's declaration should not be set aside, and why the plaintiff should not be at liberty to sign judgment as for want of a plea, on the ground that there was no marginal note to the demurrer, as required by the rule, Hilary Term, 4 Will. 4.

The rule of Hil. Term, 4 Will. 4, which requires, that "in the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated," applies to special as well as to general demurrers. And, if such points be wanting, the Court will set the demurrer aside as irregular.

Pearson shewed cause.—The rule can hardly apply to a special demurrer. In *Lindus v. Pound* (a), it was held to be a sufficient compliance with this rule to state, in the margin, that the points intended to be argued are those specially assigned. That case was confirmed by *Braham v. Watkins* (b). It would be, therefore, a mere repetition to state the points over again in the margin. [*Platt*, B.—The rule expressly states, that "in the margin of every demurrer" some matter of law intended to be argued shall be stated.]

Wade, contra, was not called on.

POLLOCK, C. B.—The rule is express, and is as binding upon us as an act of Parliament. The present rule must, therefore, be absolute. But the defendant may amend on the usual terms.

ALDERSON, B., ROLFE, B., PLATT, B., concurred.

Rule absolute.

(a) 2 M. & W. 240.

(b) 16 M. & W. 77.

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June 10.

CONNOP v. CHALLIS.

Where a party was taken in execution on a ca. sa., and the creditor's attorney, *bonâ fide*, but without his authority, entered into an arrangement with the debtor for his release, upon his paying a portion of the debt, and giving a warrant of attorney for the residue, and the sheriff, in obedience to an order from the attorney, discharged him—*Held*, in an action against the sheriff, that he was liable for the escape.

CASE against the defendants, as sheriff of Middlesex, for an escape. The defendants pleaded not guilty, and leave and license. The plaintiff joined issue upon the first plea, and traversed the second, and upon that traverse issue was joined. At the trial, before *Pollock*, C. B., at the London sittings after Michaelmas Term last, it appeared that the plaintiff had obtained a judgment against one Walmsley, upon which he had issued a writ of ca. sa., which had been intrusted to an officer of the defendants to execute. Under this writ Walmsley was taken in execution, and whilst he was in custody, an agreement was entered into between Walmsley and the plaintiff's attorney, that the former should be released on payment of 25*l.*, being part of the debt due, and on his giving a warrant of attorney for the residue. This was done, and the following authority to discharge Walmsley was given by the plaintiff's attorney to the sheriff's officer:—

“*Connop v. Walmsley*.—Discharge the defendant out of your custody, on payment of the proper fees.

“G. MILBURN, plaintiff's attorney.”

Walmsley was discharged on the receipt of this document. No authority was shewn to have been given by the plaintiff to his attorney to enter into this arrangement, but the plaintiff had not in any way repudiated that transaction, except by bringing the present action. It was contended by the plaintiff's counsel, that, on the authority of the case of *Savory v. Chapman* (*a*), the plaintiff was entitled to recover the whole amount for which the debtor had been taken in execution, as the agreement was not binding upon the plaintiff. The Lord Chief Baron, how-

(*a*) 11 Ad. & E. 829.

ever, thought that, if the jury should be of opinion that the attorney had acted fairly and reasonably under the circumstances, and that the plaintiff had not repudiated the transaction, the defendants' plea of leave and license was established. The jury having so found, the defendants, under his Lordship's direction, had a verdict, leave being reserved to the plaintiff to move to set that verdict aside, and enter a verdict for him for such sum as the Court should, under the circumstances, think proper.

A rule nisi having accordingly been obtained,

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E. James and Burchell now shewed cause.—The case of *Savory v. Chapman*, which was relied upon at the trial, only decided that the mere fact that the person who granted the party's discharge was the plaintiff's attorney, was not sufficient to warrant the discharge. There nothing was done but the discharge. No money passed. Here a warrant of attorney was given, and there was also a part payment. The attorney's warrant to prosecute the action continues in force (unless countermanded by his death or the act of the principal), for a year and a day after the judgment, for the purpose of having execution: 2 Inst. 378. [*Platt*, B.—Does that mean for any other purpose than for obtaining the money?] It was said, in *Payne v. Chute* (a), that an attorney, after judgment, may acknowledge satisfaction on the record without a new warrant. [*Platt*, B.—The general rule of Easter Term, 7 Vict. (b), that the satisfaction shall be signed by the *plaintiff*, affords an argument in your favour, that before that rule was made, it was sufficient if the attorney signed it.] The attorney must have some discretion in the matter, and if he acts bonâ fide and for the benefit of his client, the agreement ought to bind him. "The object of the writ," said *Holroyd, J.*, in the case of *Crozer v. Pilling* (c), "is that the

(a) 1 Roll. Rep. 365. (b) 12 M. & W. 868. (c) 4 B. & C. 32.

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debtor should continue in custody only until the plaintiff is satisfied his debt." It must, therefore, be contended by the plaintiff, that the attorney can exercise no discretion in the matter, and that his authority does not extend beyond the mere receipt of the money.

Martin, in support of the rule.—The defendant should have proved that the arrangement was entered into by the authority of the plaintiff. The relation of attorney and client does not create that authority. [He was then stopped by the Court.]

POLLOCK, C. B.—This rule must be absolute. As no authority was shewn by which the plaintiff authorised the attorney to enter into the arrangement under which the debtor obtained his discharge, the sheriff is liable for his escape.

ALDERSON, B., concurred.

ROLFE, B.—I am of the same opinion. The attorney was authorised to receive the fruits of the execution to the extent of 25*l.*, but he had no authority to discharge the debtor on his giving the warrant of attorney for the residue. That appears from the case of *Payne v. Chute*.

PLATT, B., concurred.

PER CURIAM.—The rule must be absolute to enter a verdict for 30*l.*

Rule absolute.

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MOLTON and Wife, administratrix of THOMAS LEE,
deceased, v. CAMROUX.

June 13.

ASSUMPSIT by the plaintiff, as administratrix of Thomas Lee, against the defendant, as secretary of the National Loan Fund Life Assurance Company, for money had and received to the use of Thomas Lee, and of the plaintiff as his administratrix, and on an account stated.

Plea, non assumpsit.

At the trial of the cause, before *Pollock*, C. B., at the London sittings after Michaelmas Term, 1846, the jury found certain facts, and the plaintiffs had a verdict, leave being reserved to enter a nonsuit.

Gurney, in Hilary Term, 1847, obtained a rule nisi, in pursuance of leave reserved, with leave to turn the facts into a special verdict. A special verdict was agreed upon, which embodied the following facts:—

The present action was brought to recover from the defendant, the secretary of the National Loan Fund Life Assurance Society, two sums of 350*l.*, and 5*l.* 6*s.* 2*d.*, which had been paid by Thomas Lee, the deceased, to the society, under the following circumstances.

Thomas Lee, on the 29th of August, 1843, made a proposal to the said society for the purchase of an annuity of 21*l.* 12*s.* 10*d.* for his life, payable yearly on the 29th of August, the first payment to be made on the 29th of August in the following year, and that he should pay the sum of 350*l.*, as the consideration of that annuity; and on the same day he made a proposal to the said society for the purchase of a deferred annuity of 30*l.* for his life, to commence on his attaining the age of sixty years, which would be on the 30th of June, 1864, the first payment to be on the

Where a person, apparently of sound mind and not known to be otherwise, enters into a contract which is fair and bonâ fide, and which is executed and completed, and the property, the subject-matter of the contract, cannot be restored so as to put the parties in statu quo, such contract cannot afterwards be set aside either by the alleged lunatic or those who represent him.

Therefore, where a lunatic purchased certain annuities for his life of a society which, at the time, had no knowledge of his unsoundness of mind, the transaction being in the ordinary course of the affairs of human life, and fair and bonâ fide on the part of the society:—*Held*, that, after the death of the lunatic, his personal representatives could not recover back the premiums paid for the annuities.

The grantee of an annuity cannot take advantage of the want of enrolment of a memorial, as required by the 53 Geo. 3, c. 141.

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30th of June, 1865, reserving to him the option of receiving, in lieu of such annuity, the sum of 293*l.* 5*s.*, payable immediately, or the deferred sum of 377*l.* 5*s.*, to be paid to his representatives after his death. The proposals were assented to and accepted by the society, and the terms of the agreements were embodied in two policies of insurance, bearing date respectively the 29th of August, 1843. The sums agreed upon of 350*l.* and 5*l.* 6*s.* 2*d.*, were then paid by the deceased, who subsequently died intestate in 1844. No memorial of these annuities had ever been inrolled in the High Court of Chancery. At the time of the making of these proposals, and of the assenting thereto and acceptance thereof, and of the granting of the said annuities, and of the payment of the said sums by Thomas Lee, the intestate, he was a lunatic, and of unsound mind, so as to be incompetent to manage his affairs; but of this the society had not at that time any knowledge. The purchases of the annuities by Thomas Lee were transactions in the ordinary course of the affairs of human life, and the granting of the annuities to him in the manner and upon the terms before mentioned, were fair transactions, and transactions of good faith on the part of the society, and in the ordinary course of their business; and at the time of making the proposals, and at the time they were assented to and accepted by the society, and of the granting of the annuities, and of the payment of the two sums by him, he appeared to the society to be of sound, though he was then in fact of such unsound mind as aforesaid. The society first had notice of the unsoundness of mind of the grantee by letter dated the 23rd of September, 1843, from his solicitors. No commission of lunacy had ever been issued against the grantee. The society had never made any payments in respect of the annuities in question, but had always been ready and willing to pay any sum which might have become due under them, and had never attempted to avoid the agreements.

The plaintiff's points were, that the said Thomas Lee,

being of unsound mind, could not make a valid contract of the nature set forth in the verdict; and secondly, that the supposed contracts were void by statute, for want of enrolment. And therefore that the plaintiffs were entitled to recover back the sums of money so paid.

The case was argued in Hilary Term, on the 17th and 21st of January, by

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Needham, for the plaintiffs.—The present case raises two questions for the opinion of this Court. First, whether the personal representatives of a lunatic can recover money which he has paid under a contract with a person who has entered into it *bonâ fide*, and without knowledge of the lunacy. Secondly, whether the annuity granted is void for want of enrolment. Upon the first point there is no direct authority; but there are many authorities in support of the principle that a lunatic cannot make a contract to bind his property. Thus, the old writ of *Dum fuit non compos mentis* lay to recover back land which had been aliened by a person not in his right mind (*a*); and it has been held, that a person *non compos mentis* cannot either make or revoke a will (*b*), and the Courts have always held their wills to be void. Nor can a lunatic suffer a recovery, *Hume v. Burton* (*c*), *Keene v. Keene* (*d*); nor execute a deed, *Yates v. Boen* (*e*); nor a bond, *Faulder v. Silk* (*f*); so he cannot indorse a bill of exchange, *Alcock v. Alcock* (*g*); nor state an account, *Tarbutt v. Bispham* (*h*). The rule is the same as respects parol contracts. In *Palmer v. Parkhurst* (*i*), a bargain by a lunatic, eight years before the lunacy found, was avoided by the party being found a lunatic. [*Parke*, B.—Was it suggested in that case, that it was known by the defendant, at the time

(*a*) Fitz., Nat. Brev., 202, (C.)

(*b*) 6 Rep. 23.

(*c*) 1 Ridg. Parl. Cas. 16.

(*d*) Ibid. 91.

(*e*) 2 Stra. 1104.

(*f*) 3 Camp. 126.

(*g*) 3 M. & Gr. 268.

(*h*) 2 M. & W. 2.

(*i*) 1 Ch. Ca. 112.

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of the bargain, that the party was a lunatic?] It does not appear by the report whether or not he was acquainted with the lunacy. [*Parke, B.*—We are not able to tell what the form of the plea was in *Alcock v. Alcock*; it does not appear whether there was any allegation of notice or knowledge of the lunacy.] The principle for which the plaintiff now contends is, that a lunatic cannot enter into a binding contract, as he cannot have a consenting mind. [*Platt, B.*—In *Done v. Viscountess Kirkwall* (a), it was held by *Patteson, J.*, at Nisi Prius, that it was not sufficient to shew that Lady Kirkwall was of unsound mind, but that the jury must be satisfied that the plaintiff *knew* it, and took advantage of it. That ruling was subsequently upheld by the Court of Queen's Bench, in the same case.] In *Clerk v. Clerk* (b), it was held, that a family settlement made by a lunatic ought to be set aside, although it was reasonable and for the convenience of the family. So the marriage of a lunatic is void: *Turner v. Meyers* (c). There Sir *W. Scott* says: "It is, I conceive, perfectly clear in law, that a party may come forward to maintain his own past incapacity; and also that a defect of incapacity invalidates the contract of marriage as well as any other contract." In *Howard v. Lord Digby* (d), *Brougham, L. C.*, says, "The law on this point is as clear, both in equity and in lunacy, and at common law, as that a man's eldest legitimate son is his heir to freehold land. A lunatic cannot bind himself by bond or by bill; a lunatic cannot release a debt by specialty; cannot be a cognizer in a statute-merchant, staple, a judgment, warrant of attorney, or any other security." [*Pollock, C. B.*—Surely a payment by a lunatic would be a good answer to the debt for which the lunatic was liable before his lunacy.] The defence of intoxication stands upon the same principle as that of lunacy;

(a) 8 C. & P. 685.

(b) 2 Vern. 212.

(c) 1 Hagg. C. R. 414.

(d) 2 Cl. & Fin. 661.

and in the recent case of *Gore v. Gibson* (a), this Court held, that acts done by a man who had lost his senses at the time, are totally void. [*Parke, B.*—The ancient doctrine, that no man of full age shall be permitted to stultify himself, has been much qualified and restricted in modern times. There is a learned note on this subject, at the end of the report of *Gore v. Gibson*, in the *Jurist*, vol. 9, p. 142. *Alderson, B.*—There is this distinction between the case of lunacy and that of intoxication: in the latter the incapacity of the party is patent—in the former, it may not be in the least degree visible.] In one respect the two cases are analogous: in neither of them has the sufferer a consenting mind. A lunatic is not criminally liable: *Reg. v. Oxford* (b). [*Parke, B.*—It has been held that a lunatic innkeeper is liable for the loss of his guest's goods: *Cross v. Andrews* (c).] There are three exceptions to be found to the rule contended for in the case of lunacy; but these exceptions will, perhaps, be found to strengthen the rule. A fine levied by a person non compos mentis has been held good: *Thompson v. Leach* (d), *Needler v. The Bishop of Winchester* (e); and the reason, as it appears from *Beverley's case* (f), is, that the act is of a public and notorious character, done in a court of record, and that the Court had the power of judging of the sanity of the party. This is confirmed by stat. 18 Ed. 1, s. 4, the "Modus levandi fines," and 10 Ed. 2, "De finibus;" and by *Mansfield's case* (g), where a fine had been made by one Bushley, an idiot, "but notwithstanding this, and although the monstrous deformity and idiocy of Bushley was apparent and visible, yet the fine stood good." The second exception to the general rule is that of a feoffment by a lunatic: *Thompson v. Leach* (h). The Court

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(a) 13 M. & W. 623.

(b) 9 C. & P. 525.

(c) Cro. Eliz. 622.

(d) 3 Mod. 305.

(e) Hob. 220.

(f) 4 Rep. 124.

(g) 12 Rep. 124.

(h) Carth. 435.

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there said, "There is a difference between a feoffment and a livery made propriis manibus of an idiot, and the bare execution of a deed by sealing and delivery thereof, as in cases of surrenders, grants, releases, &c., which have their strength only by executing them, and in which the formality of livery and seisin is not so much regarded in law, and therefore the feoffment is not merely void, but voidable; but surrenders, grants, &c., by an idiot, are void ab initio." The third exception is that of necessities; but these are clearly excepted from the general rule, on the ground that they do not require a consenting mind. Thus, an infant or an idiot may be liable for necessities, as was said in *Manby v. Scott* (a). The contracts, however, of an infant are only voidable, and not void. *Baxter v. Lord Portsmouth* (b) is a leading case upon this branch of the subject. *Abbott, C. J.*, there says: "At the time the orders were given and executed, Lord Portsmouth was living with his family, and there was no reason to suppose that the plaintiffs knew of his insanity. I thought the case very distinguishable from an attempt to enforce a contract not executed, or one made under circumstances which might have induced a reasonable person to suppose the defendant of unsound mind. The latter would be cases of imposition; and I desired that my judgment might not be taken to be, that such contracts would bind, although I was not prepared to say that they would not." In *Gore v. Gibson* (c), the distinction is clearly pointed out, namely, that, to make a party liable for necessities, it is not necessary that there should be the assent of both parties. *Pollock, C. B.*, there says: "With regard, however, to contracts which it is sought to avoid on the ground of intoxication, there is a distinction between *express* and *implied* contracts. Where the right of action

(a) 1 Sid. 112.

(b) 5 B. & C. 170.

(c) 13 M. & W. 623.

is grounded upon a specific distinct contract, requiring the assent of both parties, and one of them is incapable of assenting, in such a case there can be no binding contract; but in many cases the law does not require an actual agreement between the parties, but implies a contract, from the circumstances; in fact, the law itself makes the contract for the parties. Thus, in actions for money had and received to the plaintiff's use, or money paid by him to the defendant's use, the action may lie against the defendant, even though he may have protested against such a contract. So, a tradesman who supplies a drunken man with necessities may recover the price of them, if the party keeps them when he becomes sober, although a count for goods bargained and sold would fail. In this case, the defendant is still liable for the consideration for his indorsement, although the indorsement itself can give the plaintiff no title." [Parke, B.—A fourth exception is mentioned in *Beverley's case*, viz. a recognisance. Alderson, B.—Suppose the lunatic is benefited, do you argue that in such case the contract is void?] It is submitted that it would be. [He also referred to *Neill v. Morley* (a), and Kent's Commentary, 451.] In *Turner v. Meyers* (b), Sir W. Scott says, "It is, I conceive, perfectly clear in law, that a party may come forward to maintain his own *past* incapacity, and also, that a defect of incapacity invalidates the contract of marriage, as well as any other contract. It is true, that there are some obscure dicta in the earlier commentators on the law (c), that a marriage of an insane person could not be invalidated on that account—founded, I presume, on some notion that prevailed in the dark ages, of the mysterious nature of the contract of marriage, in which its spiritual nature almost entirely obliterated its civil character. In more modern

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(a) 9 Ves. jun. 478.

(b) 1 Hagg. C. R. 414.

(c) Sanchez. lib. 1, disp. 8, num. 15.

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times, it has been considered in its proper light, as a civil contract as well as a religious vow, and, like all civil contracts, will be invalidated by want of consent of capable persons." [Pollock, C. B.—I recollect a case where a marriage was set aside, although there was no appearance of lunacy at the time of the offer of marriage.] Pothier, in his Treatise on Obligations (*a*), says, "A contract is a particular kind of agreement; to understand the nature of a contract, we should, therefore, previously understand the nature of an agreement. An agreement is the consent of two or more persons to form some engagement, or to rescind or modify an engagement already made, *Duorum vel plurium in idem placitum consensus*." Again, in speaking of persons capable or incapable of contracting, he says (*b*), "The essence of a contract consisting in consent, it follows that a person must be capable of giving his consent, and consequently, must have the use of his reason, in order to be able to contract." In the Appendix to that article, the distinction is pointed out between persons incapable by law of contracting, and those incapable by nature.

Secondly, the annuity is void, for want of the enrolment of a memorial, in pursuance of the statute 53 Geo. 3, c. 141. [Parke, B.—If the grantor of an annuity chooses to go on paying it, it does not lie in the mouth of the grantee to say that the annuity is void. If any point was ever settled, I should say that was.] The 17 Geo. 3, c. 26, s. 1, declares, that all deeds, whereby annuities are granted, shall be *null and void to all intents and purposes*, unless a memorial be registered in manner prescribed by that act. An opinion has long prevailed, that the statute was intended for the benefit of grantors only, and therefore the word "void" must be construed "voidable;" that doctrine, however, is at variance with the object of the legislature. In *Crosley v. Arkwright* (*c*), where a person, against

(*a*) P. 1, c. 1, s. 1, art. 1. (*b*) *Id.*, art. 4. (*c*) 2 T. R. 603.

whom a fi. fa. issued, was in possession of goods under a deed given in consideration of an antecedent debt and an annuity, of which no memorial had been enrolled, it was held that the sheriff might return nulla bona, for the annuity deed was absolutely void. *Buller, J.*, there says, "The words of this statute are as strong as possible; it makes the deed void to all intents and purposes whatsoever." *Saunders v. Hardinge* (a) also decided, that every deed by which an annuity is secured, and which is not properly registered, is void, not voidable only. In *Denn v. Dolman* (b), which is to the same effect, Lord *Kenyon* adverts to the distinction between the language of the 17 Geo. 3, c. 26, s. 1, and that of the Registration Act, 7 Anne, c. 20, s. 1, which declares that a conveyance not registered "shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration." Some expressions of *Tindal, C. J.*, in the case of *Cowper v. Godmond* (c), have given rise to a contrary doctrine. That case proceeded on the authority of *Weddel v. Lynam* (d), *Waters v. Mansell* (e), and *Davis v. Bryan* (f); the former of which alone is in point, but, at the same time, is a Nisi Prius decision which never received the consideration of the Court in banc. The true mode of construing statutes is to adhere to the ordinary meaning of the words, unless that is at variance with the intention of the legislature: *Becke v. Smith* (g), *Biffin v. Yorke* (h).

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PER CURIAM:—We feel no doubt about the last point. Both reason and authority shew that it is not competent for the grantee of an annuity, who has omitted to enrol a memorial, to profit by his own default, and set up the want of registration against the grantor. The law was settled by

(a) 5 T. R. 9.

(b) 5 T. R. 641.

(c) 9 Bing. 748.

(d) 1 Esp. 309.

(e) 3 Taunt. 56.

(f) 6 B. & C. 651.

(g) 2 M. & W. 191.

(h) 5 M. & G. 428.

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the cases of *Davis v. Bryan* (a), *Churchill v. Bertrand* (b), and *Cowper v. Godmond* (c).

Gurney, for the defendant.—It is conceded that an *un-executed* contract by a lunatic cannot be enforced; but there is no case in which an executed contract, made for valuable consideration, and without notice of fraud, has been held void. In *Palmer v. Parkhurst* (d), the bill charged that the pretended satisfaction was not valuable, and was done in prejudice of the lunatic; the answer did not state it to be valuable. In *Clerk v. Clerk* (e) the conveyance was voluntary and without consideration. In *Addison v. Dawson* (f) fraud was alleged and proved. *Howard v. Digby* (g) shews that the law will sometimes imply a contract, notwithstanding lunacy. The earlier cases do not proceed on the ground, now exploded, that a lunatic cannot stultify himself, but that such contracts are not fair and equal between the parties. On that principle, an exchange, if equal, was held good. Perkins, in his *Profitable Book* (h), says, “And if a man of unsound memory, being seised of land in fee, exchanges the same with a stranger for other land in fee, and the exchange is executed, and he of unsound memory dies, and his heir enters into the land taken in exchange by his father, now he shall not avoid this exchange.” So with respect to partition, in Co. Litt. 166. a., it is said, “If coparceners make partition at full age, and unmarried, and of *sane memorie*, of lands in fee simple, it is good and firm for ever, albeit the values be unequal; but if it be of lands entailed, or if any of the parceners be of *non sane memorie*, it shall bind the parties themselves, but not their issue, *unless it be equal*.” Also in Bac. Abr. tit. “Idiots and Lunatics,” (F), it is said, “The feoffment of an idiot or non compos is not

(a) 6 B. & C. 651.

(b) 2 G. & D. 548.

(c) 9 Bing. 748.

(d) Ch. Cas. 112.

(e) 2 Vern. 413.

(f) Id. 678.

(g) 2 Cl. & Fin. 634.

(h) Tit. “Exchange,” pl. 298.

void, but voidable; but it cannot be avoided by himself, by entry, &c.; and the reason hereof, given in some books, is, as before observed, because no man by law is permitted to disable himself. The better reason in this case seems to be, that, anciently, these feoffments were not only made for the benefit of the parties, but of the realm, being annually paid for by the attendance of the tenants, in military service or in tillage, and so were presumed to be equally for the benefit of the lord and tenant; and therefore, they were not holden to be void in themselves." A lunatic may grant by fine; for, that proceeding having formerly taken place before a judge, he was presumed to guard against any unfair advantage being taken of the lunatic: *Murley v. Sherren* (a). [Parke, B.—Was it not rather that the judge was supposed to take care that the party was in a fit state of mind?] The form of pleas in avoidance of contracts, on the ground of lunacy or drunkenness, shews that the inquiry in those cases is as to the transaction being fair; for such pleas invariably contain an averment of notice: *Dane v. Viscountess Kirkwall* (b), *Gore v. Gibson* (c). In *Sentance v. Poole* (d), where the defence of imbecility of mind was set up in an action by indorsee against maker of a promissory note, Lord Tenterden told the jury, that, "should they be satisfied that the defendant was not conscious of what he was doing, and that he was imposed upon by reason of his imbecility of mind, they ought to find for him." That learned judge evidently considered, that the mere fact of being imbecile was not sufficient to avoid the contract, without shewing that an unfair advantage had been taken. There is no distinction in principle between a contract by a lunatic for necessities or for any other purpose, except that necessities are evidence to shew the fairness of the contract. It is true that *Baxter v. The Earl of Portsmouth* (e) was a case

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(a) 8 A. & E. 754.

(b) 8 C. & P. 679.

(c) 13 M. & W. 623.

(d) 3 C. & P. 1.

(e) 5 B. & C. 170.

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of necessities; but the judgment of Lord *Tenterden* proceeds on the ground, that the only contracts open to dispute are those not executed, or made under circumstances which might have induced a reasonable person to suppose the party was of unsound mind. *Williams v. Wentworth* (a) shews that, in the case of necessities supplied to a lunatic, the law will imply a promise to pay. In *Browne v. Joddrell* (b), the defendant was charged on a contract, as a member of an institution, and Lord *Tenterden* ruled that unsoundness of mind was no defence, unless it were shewn that the plaintiff imposed on the defendant. Reference is there made to a case of *Levy v. Baker*, in which the ruling of *Best, J.*, is to the same effect. *Dane v. Viscountess Kirkwall* (c), and *Clarke v. Metcalf* (d), are also cases in which lunatics were held liable on contracts, though not for necessities. No case has yet decided, that an executed contract, if fair and bonâ fide, can be questioned on the ground of the lunacy of one of the parties. It is said that a lunatic is not criminally responsible; but the more correct statement would be, that a person being a lunatic cannot be guilty of that which amounts to murder or high treason. [*Parke, B.*—In *Beverley's case* (e), Lord *Coke* says, that a lunatic may commit high treason if he kills or offers to kill the King.] A lunatic is liable civilly for a trespass; he is also liable as an innkeeper, for the loss of his guest's goods: *Cross v. Andrews* (f). Whether or no he can state an account, seems undecided: *Tarbuch v. Bispham* (g). In *Selby v. Jackson* (h), the Court refused to set aside deeds executed by a lunatic while under restraint in an asylum. The Master of the Rolls, in delivering judgment, says: "In this case it is very remarkable, that there is no allegation of fraud against the defendants, no pretence that coercion was used,

(a) 5 Beav. 325.

(b) 3 C. & P. 30.

(c) 8 C. & P. 679.

(d) Cited in Smith on Contracts, 230.

(e) 4 Rep. 123 a.

(f) Cro. Eliz. 622.

(g) 2 M. & W. 2.

(h) 6 Beav. 192.

or any stratagem, or any contrivance, employed to compel or induce the plaintiff to do an act in any way tending to the personal benefit of the defendants." This case falls within the rule laid down in *Niell v. Morley* (a), viz. that a court of equity will not interfere to set aside the contract of a lunatic, if fair and without notice, especially where the parties cannot be reinstated. The question is not, whether the payment of the premiums could have been enforced against the lunatic in his lifetime, but whether the purchase-money can now be recovered back. In many respects the case of a lunatic is assimilated to that of an infant; and the observations of Lord *Mansfield*, in *Zouch v. Parsons* (b), are applicable to both, viz., that "the privilege is a shield, and not a sword." This is like the attempt to recover premiums paid on an insurance without interest; in which case it has been held, that the premiums cannot be recovered after the risk has been run: *Lowry v. Bourdieu* (c). So also with respect to premiums paid on a policy void under the 19 Geo. 3, c. 37: *Andree v. Fletcher* (d); or any illegal assurance: *Lubbock v. Potts* (e); *Morck v. Abel* (f).

Needham, in reply.—The case of *Baxter v. The Earl of Portsmouth* did not establish the rule, but the exception. The maxim of the Roman law, "furiosus nullum negotium gerere potest, quia non intelligit quod agit" (g), has been adopted by all text writers in every civilised community. Upon what principle is it that a lunatic cannot suffer a recovery, and that his bond is void, unless it be that he cannot make a contract? In *Thompson v. Leach* (h), the Court say, "The grants of infants and persons non compos are parallel, both in law and reason." A lunatic, not having the power of consenting, is incapable of making a contract.

Cur. adv. vult.

(a) 9 Ves. jun. 478.

(b) 1 W. Bl. 575.

(c) 2 Dougl. 468.

(d) 3 T. R. 266.

(e) 7 East, 449.

(f) 3 Bos. & P. 35.

(g) Inst., lib. 3, tit. 20, s. 8.

(h) 3 Mod. 310.

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The judgment of the Court was now delivered by

POLLOCK, C. B.—This was an action for money had and received, brought to recover from the defendant, (as secretary to an Assurance and Annuity Society), two sums paid by the intestate Thomas Lee, in his lifetime, as the price or consideration for two annuities granted by the society, determinable with his life. At the trial, the money was claimed on two grounds: first, that the grantee was not of sound mind at the time the contract was made, and was therefore incapable of contracting, and, there being no contract, or a void contract, the money was recoverable; secondly, that there was no memorial of the annuities inrolled, and therefore they were void, and the money could be recovered back. Both the points were reserved at the trial; and subsequently, on a motion for a new trial, a special verdict was entered by agreement, setting forth the facts of the case, and raising the two points above stated.

The special verdict was argued before us on the 17th and 21st of January last, when the Court expressed a very clear opinion, that the second ground, of want of inrolment of a memorial, could not be supported, on the authority of the case of *Davis v. Bryan* (a), (and of other cases), where the point was expressly decided: but as to the other ground, the Court took time to consider; and upon deliberation we are all of opinion, that, upon the finding of the jury, that the “purchasing the said annuities were transactions in the ordinary course of the affairs of human life, and that the granting of the said annuities were fair transactions, and of good faith, on the part of the company, without any knowledge or notice on the part of the company of the unsoundness of mind,” the action is not sustainable; and our judgment must be for the defendant.

As to the rule of the common law, the older authorities differ. According to the opinion of Littleton, s. 405, and Lord Coke, 1 Inst. 247. b., and *Beverley's case* (b), (disagree-

(a) 6 B. & C. 651.

(b) 4 Rep. 123, a.

ing with Fitzherbert's "Natura Brevium" 202), no man could be allowed to stultify himself, and avoid his acts, on the ground of his being non compos mentis; but certainly the law did not allow the party himself to set aside, by any plea of insanity, acts of a public and notorious character, such as acts done in a court of record, and feoffments with livery of seisin, the doing or executing of which would not presumably be allowed, unless a party appeared to be of sound mind.

The purchase also by a lunatic was valid, and vested the estate, and though his heirs might disagree to it, he could not (a).

But the rule, as above laid down by Littleton and Coke, has, no doubt, in modern times been relaxed, and unsoundness of mind (as also intoxication) would now be a good defence to an action upon a contract, if it could be shewn that the defendant was not of capacity to contract, and the plaintiff knew it. The cases of *Dane v. Viscountess Kirkwall* (b), and *Gore v. Gibson* (c), were cited to prove this, and their authority fully supports the doctrine contended for. The plaintiff's counsel distinguished the cases of *Browne v. Joddrell* (d), and *Baxter v. The Earl of Portsmouth* (e), and other cases of that sort, on the ground that necessities furnished to a lunatic were an exception to the general doctrine that he could not make a contract; and he cited the judgment of the Lord Chief Baron, in the case of *Gore v. Gibson*, as shewing a distinction between express and implied contracts, and deciding that all express contracts were void, if the parties to them were incapable of making a contract. On the other hand, it was argued by the defendant's counsel, that there was a distinction between contracts executed and executory; that executory contracts could not be enforced, but that executed contracts could not be disturbed,

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(a) Co. Litt. 2.

(b) 8 C. & P. 679.

(c) 13 M. & W. 623.

(d) 1 Moo. & M. 105.

(e) 2 C. & P. 178; 5 B. & C.
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if made in good faith and without notice of the incapacity; and he called our attention to this, that all the cases cited were cases where damages for the breach of an executory contract were in question, but that no case had yet decided, that an executed contract, if perfectly fair and bonâ fide, could be questioned on the ground of the unsoundness of mind of one of the parties; and he cited the cases of *Howard v. The Earl of Digby* (a), *Williams v. Wentworth* (b), and *Selby v. Jackson* (c), to shew that the House of Lords in the first case, and Lord *Langdale* in the two last, had recognised the liability of lunatics or their estate, in respect of contracts bonâ fide acted upon. The case of *Niell v. Morley* (d), before Sir *William Grant*, to the same effect, had been cited before by the counsel for the plaintiff.

As far as we are aware, this is the first case in which it has been broadly contended, that the executed contracts of a lunatic must be dealt with as absolutely void, however entered into, and although perfectly fair, bonâ fide, reasonable, and without notice on the part of those who have dealt with the lunatic.

On looking into the cases at law, we find that, in *Browne v. Joddrell*, Lord *Tenterden* says, "I think the defence (of unsoundness of mind) will not avail, unless it be shewn that the plaintiff imposed on the defendant."

In *Baxter v. The Earl of Portsmouth* (e), (the *Nisi Prius* authority of which is in 2 C. & P. 178), *Abbott*, C. J., with the concurrence of the rest of the Court, laid down the same doctrine.

In *Dane v. Viscountess Kirkwall*, Mr. Justice *Patteson*, in directing the jury, said, "It is not sufficient that Lady *Kirkwall* was of unsound mind, but you must be satisfied that the plaintiff knew it, and took advantage of it."

We are not disposed to lay down so general a proposition, as that all executed contracts bonâ fide entered into must

(a) 2 Cl. & Fin. 634.

(d) 9 Ves. 478.

(b) 5 Beav. 325.

(e) 5 B. & C. 170.

(c) 6 Beav. 192.

be taken as valid, though one of the parties be of unsound mind; we think, however, that we may safely conclude, that when a person, apparently of sound mind, and not known to be otherwise, enters into a contract for the purchase of property which is fair and bonâ fide, and which is executed and completed, and the property, the subject-matter of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put the parties in statu quo, such contract cannot afterwards be set aside, either by the alleged lunatic, or those who represent him. And this is the present case, for it is the purchase of an annuity which has ceased.

On these grounds we think our judgment ought to be for the defendant.

Judgment for the defendant (a).

(a) Affirmed on error by the Court of Exchequer Chamber, (May 29, 1849).

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GAWLER v. CHAPLIN and two Others.

June 8.

CASE.—The declaration stated, that two several writs of fieri facias had issued out of the Court of Queen's Bench, directed to the sheriff of Middlesex, upon two several judgments recovered by one James Lees against the now plaintiff, which said writs were indorsed &c., and were afterwards, and before the respective returns thereof, to wit, on &c., delivered to the defendants W. J. Chaplin and J. L., who then, and from thence until and at and

In an action on the case against the sheriff, the declaration, after reciting that two writs of fi. fa. had been delivered to him to be executed, stated, that the defendant, as such sheriff, under colour of the writs, wrongfully and injuriously seized goods of the plaintiff, of much greater value than sufficient to pay and satisfy the sum of money, interest, poundage, &c., indorsed on the writs, although the defendants well knew that the money arising from a part of the goods so seized would be sufficient to satisfy the indorsement on the writs; yet the defendant, contriving &c., afterwards, under colour of the said writs, wrongfully &c. did sell and dispose of more goods than necessary to satisfy the indorsement on the writs; and the defendant, further disregarding his duty &c., then sold the said goods for a much less sum of money than he could, might, and ought to have sold the same :—*Held* sufficient, on motion in arrest of judgment.

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after the return of the said writs, were sheriff of the said county of Middlesex; and the defendant M. S., as their bailiff, afterwards and before the return of either of the said writs, to wit, on &c., within the bailiwick of the said W. J. Chaplin and J. L., as such sheriff as aforesaid, under colour of the writs, wrongfully and injuriously seized and took in execution divers goods and chattels, that is to say, (specifying them), of the now plaintiff, of much greater value than sufficient to pay and satisfy the sums of money, interest, poundage, and expenses, so indorsed on the said several writs, and thereby directed to be levied as aforesaid, to wit, of the value of &c., although the now defendants then well knew, that the money arising from the sale of part of the said goods and chattels so seized and taken in execution as aforesaid, would be sufficient to satisfy and pay the said sum of money, interest, poundage, and expenses, so indorsed and directed to be levied as aforesaid; yet the now defendants, contriving and wrongfully and unjustly intending to injure, oppress, &c., the now plaintiff, afterwards, to wit, &c., under colour and pretence of the said several writs, wrongfully and injuriously did sell and dispose of many more of such goods and chattels than were necessary and sufficient to pay and satisfy the said sums of money and interest, poundage and expenses, so indorsed and directed to be levied as aforesaid, to wit, the whole of the said goods and chattels so seized as aforesaid, and thereout levied a much greater sum than was sufficient to pay and satisfy all said sums of money, interest, poundage, and expenses, to wit, &c.; whereas the defendants then levied the said sum of money, interest, poundage, and expenses out and by means of the sale of part of the said goods and chattels, to wit, one-fifth part thereof: and the defendants, further disregarding their duty in that behalf, and contriving to injure the plaintiff, wrongfully and injuriously then sold the said goods and chattels for a much less sum of money, to wit, for &c., being much less, to wit,

&c., less than the same were really worth, and for which the defendants could and might have and ought to have sold the same: and the defendants then converted and disposed of the monies arising from the said sale to their, the defendants', own use; by means whereof &c. The defendants pleaded not guilty, with other pleas, upon which issue was joined.

At the trial of the cause, before *Rolfe*, B., at the Middlesex sittings, in Hilary Term last, the plaintiff obtained a verdict. In the same term, (Jan. 19),

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Humfrey moved for a rule calling on the plaintiff to shew cause why the judgment should not be arrested, or for a venire de novo; or why there should not be a new trial, on the ground of the verdict being against the evidence. There are three breaches in the present declaration, and, if the Court should be of opinion that either of them is insufficient, the defendants will be entitled to a venire de novo. The first breach is bad. It charges the defendants with seizing goods of the plaintiff, of greater value than sufficient to satisfy the sums indorsed upon the writ of execution. But the sheriff is justified in seizing enough to satisfy all demands for rent and taxes. The breach does not contain any allegation that the seizure was excessive or unreasonable. The second breach is also bad on the same grounds. It should have alleged that the defendants sold more goods than sufficient to meet the rent. Then the third breach does not state that the goods were sold negligently or improperly. [*Rolfe*, B.—That breach alleges that the goods were sold for much less than the defendants *could, might, and ought*, to have sold them for.] He referred to *Phillips v. Bacon* (a). [*Parke*, B.—The same question, with respect to the second and third breaches, arose in a case nearly similar to the present, *Slade v.*

(a) 9 East, 298.

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Hawley (a); that was upon special demurrer. The defendants may take a rule on the first ground, of the verdict being against the evidence, but we will consider the question as to arresting the judgment.]

Cur. adv. vult.

PARKE, B., on a subsequent day, (Jan. 31), said:—A rule was granted in this case, to shew cause why there should not be a new trial, on the ground of the verdict being against evidence. There was also a motion in arrest of judgment. It was an action brought by the plaintiff (who had been the defendant in another suit), against the sheriff of Middlesex, for a wrongful execution. It was contended that there were three breaches, the first alleged breach being, that the defendants wrongfully seized goods of the plaintiff, of greater value than sufficient to pay the debt, interest, poundage, and expenses, although they well knew part would be sufficient. The second, which certainly was a breach, was for wrongfully selling more than sufficient; and the third was for selling goods for less than they were really worth, and than they ought to have been sold for. The principal objection was to the first alleged breach. With regard to the second and third there is no doubt: both are perfectly good after verdict, although they might be open to special demurrer. A special demurrer prevailed in a case nearly similar—that of *Slade v. Hawley* (b). The objection is therefore confined to the first breach, which alleges that the sheriff seized more goods—a larger quantity of goods than were sufficient, knowing that part only was sufficient to satisfy the debt, interest, poundage, and expenses. The question is, whether that breach is good. We are all of opinion it is a good breach. The duty of the sheriff, when he receives a process of execution against a man's goods, is to seize only such quantity of goods as would be reasonably sufficient to pay the amount

(a) 13 M. & W. 757.

(b) 13 M. & W. 757.

indorsed on the writ. Mr. *Humfrey* contended, that he ought also to provide for any rent that might be due to the landlord. The consequence of that doctrine would be, that, upon an execution for 10*l.*, if the premises were liable to a rent of 100*l.* a year, the sheriff might seize the whole property on the premises, because that might only be sufficient to cover the amount of the debt, together with the rent which might be possibly due. But we think the duty to seize in respect of a year's rent does not arise in the first instance, until the landlord has made a claim: if the plaintiff refuses to pay the amount of the rent, the sheriff may levy that amount under the original writ, and consequently seize a larger quantity of goods. But, in the first instance, the duty of the sheriff is confined to seizing goods that would be reasonably sufficient, if sold, to pay the sum indorsed on the writ—that is, the debt, interest upon the debt, poundage, and expenses; and if the sheriff seizes more, *primâ facie* he is a wrongdoer. We think, therefore, that the first alleged breach, as well as the second and third, is good, and consequently we cannot grant any rule to arrest the judgment. The rule for a new trial, on the ground of the verdict being against evidence, must remain.

Rule refused.

The rule on the other point was now discharged, the parties having come to an arrangement.

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JACOBS v. HYDE.

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A final order for protection under the statutes 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, not only protects the person of the insolvent, but constitutes an absolute bar to an action for the debt as to which it is a protection, and may be so pleaded.

To an action of debt the defendant pleaded, that, after the passing of the 5 & 6 Vict. c. 116, and before the 7 & 8 Vict. c. 96, and before the commencement of the suit, a petition for protection from process was duly, according to the form of the statute, presented by the defendant to the Court of Bankruptcy, and afterwards filed in that court; and

that thereupon, and after the passing of the said secondly-mentioned act, to wit, on &c., a final order for protection and distribution was made in the matter of the said petition by J. E., Esq., a commissioner of the said court duly authorised; and that the said debts, &c. accrued before the issuing of the said petition. Verification:—*Held* good, on special demurrer.

Where the goods of an insolvent had been seized under a writ of fieri facias issued upon a judgment signed against him, and between the date of the judgment and the issuing of the writ of *fi. fa.* he had obtained an order for protection and distribution, under the 5 & 6 Vict. c. 116, the Court, upon motion, set aside the writ on terms.

THE first-mentioned case was an action of *assumpsit* by the plaintiff as indorsee, against the defendant, the acceptor, of a bill of exchange for 50*l.*

The defendant pleaded, that, before the commencement of this suit, to wit, on the 3rd of May, 1846, a petition for protection from process was duly and according to the form of the statute made, and presented by the defendant to her Majesty's Court of Bankruptcy; and that afterwards, and before the commencement of this suit, to wit, on the 23rd of July, in the year aforesaid, a final order for protection and distribution was made in the matter of the said petition by John Samuel Martin Fonblanque, Esq., a commissioner of the said Court of Bankruptcy duly authorised in that behalf, and that the causes of action in the declaration mentioned, and every part thereof, were contracted before the date of filing the said petition. Verification,—Replication, that a final order for protection and distribution was not made *modo et formâ*: upon which replication issue was joined. At the trial of this cause, before *Pollock*, C. B., at the Middlesex Sittings after Easter Term, 1847, the defendant put in a final order for protection from process, under the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, in the form specified in the schedule of the latter act, but with the following words struck out:—"And it is hereby directed, that the

proposal of the said petitioner set forth in his petition, for the payment of his debts, be carried into effect in the following manner; that is to say." The Lord Chief Baron was of opinion that the final order produced was not "a final order for protection and distribution;" and under his Lordship's direction the plaintiff had a verdict.

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Hake obtained a rule in Trinity Term, 1847, calling upon the plaintiff to shew cause why the verdict should not be set aside, and a new trial had, on the ground of misdirection. Against this rule

Humfrey, (with whom was *S. Temple*), in Easter Term last, (May 2), shewed cause.—The case of *Toomer v. Gingell* (a) is an express decision upon this question. It was there held, that a final order under the 7 & 8 Vict. c. 96, s. 22, could not be pleaded at law to an action for the recovery of a debt mentioned in the insolvent's schedule, as the order was for the protection of the *person* only. *Maule, J.*, there said, "It certainly seems to me that the intention of the legislature was, to restrict the protection of the final order to the *person* of the petitioner."—He was then stopped by the Court, who called upon

Hake, in support of the rule.—Under the stat. 5 & 6 Vict. c. 116, two classes of cases arose—those of *Nicholls v. Payne* (b) and *Gillon v. Deare* (c), which were with reference to special pleas framed on the 4th section of that act, and shew clearly that the plea in *Toomer v. Gingell* was bad. The other class, namely, the case of *Bindle v. Snelling* (d), in this court, and *Cook v. Henson* (e), arose on the statutory general issue given by the 10th section, and are decisions to the effect that the present plea is good. The

(a) 3 C. B. 322.

(d) Not reported.

(b) 7 Man. & G. 927.

(e) 1 C. B. 908.

(c) 2 C. B. 309.

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plea in *Toomer v. Gingell* was obviously bad for the reasons given by the Court of Common Pleas in *Nicholls v. Payne* and *Gillon v. Deare*. It is therefore highly probable, that that Court, in the case of *Toomer v. Gingell*, grounded their decision on the principles on which they had recently acted, and altogether irrespectively of the provisions of the stat. 7 & 8 Vict. c. 96. Now, the 22nd section of that statute is substituted for the 4th section of the stat. 5 & 6 Vict. c. 116, leaving the 10th section of the previous act unaffected by its provisions. The word "distribution" must receive its interpretation from the 7th, 9th, and 12th sections of the 7 & 8 Vict. Its meaning receives further illustration from the 87th section of the 1 & 2 Vict. c. 110, which provides for the mode in which after-acquired estate shall be "*distributed rateably*." These provisions make the final order (if granted) the means of effecting a distribution of all future as well as present estate, until all the debt shall have been satisfied. But if the final order be refused, the 10th section of the 7 & 8 Vict. c. 96, re-vests the property in the petitioner. The legislature, therefore, by the 5 & 6 Vict. c. 116, directs the final order to be pleaded according to the legal operation which those sections impart to it; and the 7 & 8 Vict. c. 96, does not in any way alter the legal effect of the final order, but only alters the form of it. The 4th section of the 5 & 6 Vict. c. 116, describes the *form only* of the final order, and includes only such estate as the insolvent may possess at the date of the final order: so that, so far as it respected the future estate, the effect of the final order always depended on the 7th section of the stat. 5 & 6 Vict. c. 116. It would have the effect of repealing all the provisions touching after-acquired estate, to hold that final orders like the present are not within the meaning of the 10th section of the 5 & 6 Vict. c. 116: at the same time, it would super-add to the 22nd section of the 7 & 8 Vict. c. 96, the following words of the 5 Geo. 2, c. 30, s. 9:—" *It shall only protect his person from arrest, but his future estate shall remain liable*

to his creditors." In addition to this, by the 30th section of the 7 & 8 Vict. c. 96, it is expressly enacted, that the petitioner shall, as regards any debts which may have been, through mistake, misstated in the schedule, be entitled to "every benefit and protection of the said recited act and of this act." And by the 9th section, the petitioner may except out of the operation of the insolvent law working tools, &c., to the value of 20*l*. This surely is not saved from the operation of the insolvent law, to be made subject to the process of the county courts; yet this must be the case if the petitioner can no longer plead the final order in bar. In the last place, the several acts upon the subject of insolvency must be looked at and construed as one entire system, in the same manner as are statutes relating to bankruptcy and the poor laws: *Rex v. Loxdale* (a). For the purposes of this argument it will be advantageous to consider and to compare together the corresponding sections of the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, and the 10th, 29th, and 32nd sections of the 53 Geo. 3, c. 102, and the 87th, 90th, and 91st sections of the 1 & 2 Vict. c. 110.

Cur. adv. vult.

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DEBT by the payee against the maker of a promissory note. Plea, that, after the accruing of the said debt, &c., and after the passing of an act of Parliament passed in a session of Parliament held in the fifth and sixth years of the reign of her present Majesty Queen Victoria, intituled "An Act for the Relief of Insolvent Debtors," and before the passing of a certain other act of Parliament passed in a session of Parliament held in the seventh and eighth years of the reign of her said Majesty, intituled "An Act to

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(a) 1 Burr. 44.

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amend the Law of Insolvency, Bankruptcy, and Execution," and before the commencement of this suit, to wit, on the 22nd day of July, A. D. 1844, a petition for the protection of the defendant from process was duly, and according to the form of the statute in such case made and provided, presented by the defendant to her Majesty's Court of Bankruptcy, and afterwards, to wit, on the day and year aforesaid, filed in the said court; and thereupon afterwards, and before the commencement of this suit, and after the passing of the said secondly-mentioned act, to wit, on the 26th day of September, 1844, a final order for protection and distribution was made in the matter of the said petition by J. Evans, Esq., a commissioner of the said Court of Bankruptcy duly authorised in that behalf; and that the said several debts and causes of action in the declaration mentioned, and each and every of them, and every part thereof, accrued before the date of the said filing of the said petition in the said Court of Bankruptcy. Verification.

Special demurrer, assigning for causes, that the plea is not in the form authorised by the statute, but that it differs from it in averring that the petition was presented and the order made after the passing of the act in the plea first mentioned, and before the passing of the act in the plea secondly mentioned, and that the petition was filed in the said court; that the proceedings in the said court in the matter of the petition and final order of the commissioner are not averred to have been entered of record; that there is no reference to the record, and the plea does not conclude with a verification by the record; that it is not stated with sufficient particularity how the commissioner was authorised to act in the matter, and that he signed the final order; that the order ought to be set out, in order that the Court may judge of its legal effect; that the averment that the final order was for protection and distribution is too general; and that it is stated to have been made after the passing of the second statute, which does not apply to

orders made in that form, being such a one as the commissioner had no power to make.

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Butt (May 5) argued in support of the demurrer.—The plea is bad in substance and form. The case of *Toomer v. Gingell* (a) is an express authority upon the first ground. [*Parke*, B.—This question is now pending in this court, in the case of *Jacobs v. Hyde*, which was recently argued here.] [He then contended that the plea was bad for the reasons pointed out by the demurrer, and cited *Lewis v. Harris* (b), *Gillon v. Deare* (c), *Cook v. Henson* (d), *Tyler v. Shinton* (e), *Fisher v. Gibbon* (f), and *Leaf v. Robson* (g).]

Ring, contra, was not called on.

PARKE, B.—We all think that this plea is good in its present form, according to the case of *Cook v. Henson*. As to the main question in the case, we will take time to consider that.

Cur. adv. vult.

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IN this case a summons had been obtained by the defendant, in the Common Pleas at Lancaster, calling on the plaintiff to shew cause why the writ of fieri facias issued in this cause, and all subsequent proceedings, should not be set aside, with costs, the defendant having, previously to the issuing of the said writ, obtained an order for protection and distribution of his effects from the District Court of Bankruptcy at Manchester; and why in the meantime

(a) 3 C. B. 322.

(b) 17 L. J., Q. B., 129.

(c) 2 C. B. 309.

(d) 1 C. B. 908.

(e) 8 Q. B. 810.

(f) 2 Dowl. & L. 869.

(g) 13 M. & W. 651.

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all further proceedings should not be stayed. It appeared from the affidavits, that, on the 25th of March, 1841, the plaintiff had obtained a judgment in this action, and that on the 23rd of June, 1843, a writ of scire facias was issued thereon; that on the 15th of August following the plaintiff signed judgment upon that scire facias; and on the 10th of March, 1848, a fieri facias was issued. It further appeared, that the defendant did, on the 26th of June, 1843, duly file his schedule and petition for protection from process, under the statute 5 & 6 Vict. c. 116, and that a final order was made thereon for protection and distribution, by E. Ludlow, Esq., the commissioner of the said Court of Bankruptcy, on the 20th of December, 1843, and that the debt, damages, and costs sought to be recovered by this action were inserted in that schedule. On the 20th of December, 1843, the plaintiff was appointed one of the assignees of the estate and effects of the defendant; and in January, 1847, a dividend was declared, of which the plaintiff received a certain sum. On the 10th of March, 1848, the defendant's goods were seized under the writ of fieri facias above mentioned.

The case was argued in the present term, (May 27), before *Alderson*, B., and *Rolfe*, B., by

Atherton, in support of the summons.—The defendant is entitled to protection under the 10th section of the 5 & 6 Vict. c. 116. It will be contended, on the part of the plaintiff, that this order for protection protects the person of the insolvent only. [*Alderson*, B.—That question is at the present moment before this Court. Assuming that the order is pleadable in bar as a defence to an action, under the 10th section of the act in question, you may proceed to the question whether, under the facts of this case, the defendant is entitled to the relief he asks.] In the case of *Davis v. Shapley* (a),

(a) 1 B. & Ad. 54.

which was like the present, and where the defendant was a *bankrupt*, the Court interfered and set aside the *fieri facias*. That was under the 6 Geo. 4, c. 16, s. 121, which enacts, that a bankrupt shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands thereby made proveable under the commission, in case he shall obtain his certificate. There the goods of the defendant, a certificated bankrupt, acquired after the bankruptcy, having been seized under a *fieri facias* issued upon a judgment in respect of a debt due before the bankruptcy, the Court of King's Bench set aside the *fieri facias*. So, in the case of *Barrow v. Poile* (a), the same Court relieved the defendant. Lord *Tenterden*, C. J., there said, "Whether the language of the 126th section is sufficiently general to include the present case or not, does not seem to me to be very material; it points out the course of proceeding in particular instances, but it cannot control the general words of the 121st section; and it being manifest that the plaintiff's demand is one which might have been proved under the commission, I think we should not give effect to the words of that section, which provides that the bankrupt obtaining his certificate shall be discharged from every demand proveable under the commission, if we were to reject the present application, and put the defendant to the course which has been suggested," namely, to an *audita querela*. The 37th section of the 5 & 6 Vict. c. 122, is a re-enactment of the 121st section of the 6 Geo. 4, c. 16. Now, although there was no express enactment as to after-acquired property in the 6 Geo. 4, c. 16, yet the Court granted relief. The laws of bankruptcy and insolvency bear a strong analogy in many respects. The provisions for the vesting of the insolvent's property in the assignees, under the 7th and 9th sections of 5 & 6 Vict. c. 116, are similar to those under the bankrupt law, by which

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(a) 1 B. & Ad. 629.

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a bankrupt's property is vested in the official assignees; and the 8th section expressly refers to the Bankrupt Act (1 & 2 Will. 4, c. 56) as to the registry of the certificate of the appointment of the assignees. The cases of insolvency and bankruptcy are analogous for the purposes of this application, and the defendant is entitled to the same relief as he would have obtained had he been a bankrupt.

H. Hill, contra.—If the Court should be of opinion that the defendant is entitled to be relieved from the effect of this writ of execution, on the ground that the materials of this application would support an *auditâ querelâ*, it will be upon such terms as the Court may think fit to impose. In the cases cited the Court imposed terms upon the defendant. The bankrupt and insolvent law do not bear that analogy for which the defendant contends. There is no provision in the insolvent acts to support this application. The 91st section of the 1 & 2 Vict. c. 110, which is an act in *pari materiâ* with the present, contains an express provision, that, after discharge, no execution shall issue against an insolvent for debts &c., to which adjudication extends. Now, unless the defendant can plead the defence in bar, as given by the 10th section of the 5 & 6 Vict. c. 116, he can obtain no relief under that clause. [*Alderson, B.*—The real question is, whether the defendant, under the present circumstances, is not entitled to relief by an *auditâ querelâ*, under the 10th section; and if he is, whether we cannot assist him without putting him to the expense of this step, at the same time being at liberty to impose such terms as may be in our discretion. I believe that this Court does not altogether agree with the decision of the Court of Common Pleas in the case of *Toomer v. Gingell (a)*.] The 121st section of the 6 Geo. 4, c. 16, enacts, that “the bankrupt shall be *discharged* from all debts due by him when he became bank-

(a) 3 C. B. 322.

rupt." There is no such expression as *discharged* in the 10th section of the 5 & 6 Vict. c. 116, the words being, "if any suit or action is brought &c., it shall be a sufficient *plea in bar*." The analogy between the acts does not hold good.

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Atherton replied.

ALDERSON, B.—Assuming that the order which the defendant obtained protects his property, and could be pleaded under the 10th section of the stat. 5 & 6 Vict. c. 116, in bar of an action brought against him in respect of a debt due before the filing of the petition, I think that he is entitled to relief by *auditâ querelâ*, and, therefore, that we may afford him relief on motion also. Should, therefore, the Court be of opinion that this order is so pleadable in bar, the present rule will be absolute to set aside the writ of *fieri facias* and the execution, but without costs; the defendant undertaking to bring no action.

ROLFE, B., concurred.

Cur. adv. vult.

The judgment of the Court, in the case of *Platel v. Beville*, was now delivered by

ROLFE, B.—(After stating the pleadings, his Lordship proceeded):—In the course of the argument, the Court intimated its opinion that the plea was sufficient in form, and stated all that by the statute of the 5 & 6 Vict. c. 116, s. 10, was required to constitute a good defence.

The only remaining question was, whether a final order, obtained under the 7 & 8 Vict. c. 96, constitutes an absolute bar to an action for the debts as to which it is a protection, or operates only as a protection to the person of the insolvent; in which latter case it ought not to be pleaded

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as an absolute bar, but specially in bar of execution against the person only.

We are of opinion that it is an absolute bar, and consequently our judgment must be for the defendant. We have to construe the provisions of two acts of Parliament which are by no means clearly expressed, especially the latter, the wording of which, particularly of the form given in the schedule for the order of protection, is likely to mislead the reader; but, on a careful consideration of the clauses of both acts, we think the intention of the legislature is sufficiently plain, and that there is no difference in the legal effect of the final order given under the second, from that given under the first act, as to the discharge of the insolvent.

In both, we are of opinion that it constitutes an absolute bar to the actions in respect of which it is a protection, as it is admitted it did under the first act. The last act terms the final order to be made "*under the provisions of the said act, as amended by this act,*" (sect. 22). The section then proceeds to define from what debts the person is to be protected, (adopting the language of the old Insolvent Act, 7 Geo. 4, c. 57, s. 46), and directs the form in the schedule to be followed; but the power of making the final order arises from the *former act*, and its effect is the same as under the former act, except so far as it is varied by the latter. Sect. 74 of the latter act directs, that nothing therein contained shall be construed to repeal, affect, or in any manner alter the provisions of the 5 & 6 Vict., "except so far as herein *expressly* provided, and except so far as the provisions of the said recited act may be inconsistent with, or at variance with the provisions of this act."

Now, the last act does make certain express alterations. It provides a more easy way of petitioning for the protection from process in the first instance (which petition is still to be *under the former act*), for it dispenses with notice in the Gazette, &c. It also provides for the appointment of the creditors' assignee, and the vesting of the estate in

him by the appointment, prior to, or at least independently of the final order; whereas, under the former act, the creditors' assignee had not the estate vested in him until the final order, which, by sect. 4, was to be for the protection of the person of the insolvent, and *vesting the estate in the creditors' assignee*, and also in the official assignee to be named by the commissioner. An alteration is made in the effect of the assignment to the official or creditors' assignee by sect. 11, by vesting powers in them; by sect. 17, vesting in them goods in the apparent ownership of the insolvent. But with respect to property acquired after the final order, no alteration seems to have been made. By the first act, on the passing of the final order, all the estate *present and future* of the insolvent vests in the assignees, as under a fiat; but then, by sect. 9, the assignees must file a claim in order to take after-acquired effects, and cannot take possession but by an order from the commissioner or the Court of Review: so that, both sections being read together, it seems that the assignees take all present property absolutely, and have a right to obtain all that is subsequently acquired by the insolvent. This is the only way of reconciling these contradictory clauses.

The 4th section, explained by the 73rd, leaves no doubt on this question under the second act, for the appointment vests the property of the insolvent, that is, all present and future estate which shall come to him, *before he shall have obtained the final order*, leaving all subsequently-acquired property to be dealt with under the former act, for the 9th section of that act is certainly not repealed.

In our view, the rights of the assignees to after-acquired property are the same under both acts. The alterations above noticed, and others, are made by the 7 & 8 Vict.; but that statute makes no alteration in the effect of the order *as a defence*—at least, no express alteration; and it leaves the 10th section, which gives the defence, unrepealed. Nor is there any enactment in the new statute which is in-

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consistent with the provision that the final order should constitute a sufficient plea in bar; and therefore, by the 7th section, that provision must still be in full force. If the former act had vested all subsequently-acquired property in the assignees, and the latter act had altered this, there would have been ground for the implication that the legislature meant to do away with the absolute defence given by the 10th section, and to leave the creditors to take their remedies against subsequently-acquired property by a *fieri facias*.

But we think the rights of the assignees to after-acquired property are not affected, and consequently that such implication does not arise; and there is therefore no inconsistency or variance between the first and second act in this respect to authorise us to repeal the 10th section, as being impliedly repealed by the new act.

The form given by the schedule, it is true, protects expressly the person only; and the giving such a form is no doubt an incautious mode of legislating, and is calculated to mislead. But then the final order directed by the first act is no more than an order of protection of the person. Sect. 4 says the order shall be called a final order, and shall be for the protection of the *person from process*, and for vesting of the estate, which latter operation is now otherwise provided for; but its effect as a measure of protection is only in terms for the protection of the person—not a word is directed to be introduced that imports any protection but that of the person in the order itself. The privilege of pleading it in bar arises entirely from the 10th section, which describes the legal effect of such an order as “an order for protection *and distribution*”—a very inaccurate expression, no doubt; for there is nothing in the order, as required by the first act in general terms, and particularly directed in the schedule to the second act, which takes notice of a distribution, or requires it. The final order under the second act is not an order for distribution; but neither was the final order

required by the first act; and if the 10th section allows the order to be pleaded in inapposite terms, the same direction must be followed as to that required by the second; and it may also be pleaded in the same inapposite terms.

Considering the two acts together as one system, we see no reason to suppose that the legislature, which clearly meant to give facilities to the debtor to obtain his discharge, intended also to limit the operation of that discharge under the new act, all his property, present and future, being disposed of for the benefit of creditors in the same way in both acts. We think that the legal effect of the discharge is the same in both acts, and that the effect inartificially described in the 10th section belongs just as much to an order under the second as under the first act. This view of the two acts differs from that which my Brother *Maule* is reported to have taken in the case of *Toomer v. Giggell* (a). The question in that case was not fully argued, the learned counsel for the defendant having, after taking time, acted upon the impression, as to the meaning of the second act, which its language is, at first sight, so likely to create, and abandoned the argument.

Upon the best consideration we can give to these acts, we think that the impression was a wrong one, and that the effect of the final order is the same under both acts.

Judgment for the defendant.

His Lordship then added:—The case of *Jacobs v. Hyde* is decided by this; and the rule must be absolute.

Rule absolute.

(a) 3 C. B. 322.

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MOUNSEY and Another v. PERROTT.

June 3.

A declaration stated, that it was agreed between the plaintiff and the defendant that the defendant should buy of the plaintiffs, and the plaintiffs sell to the defendant, 1000 barrels of flour, to arrive at Liverpool by a vessel called the Hottinguer from New York; that should the vessel be lost before arriving at Liverpool, the sale should be void. Averment, that the vessel was not lost, but did arrive at Liverpool from New York, having on board 1000 barrels of flour. Breach, that the defendant would not accept the flour. Plea, that the Hottinguer was one of a line of packet

ships sailing from New York to Liverpool at fixed periods, published and known beforehand amongst merchants at Liverpool: that the Hottinguer was to have set sail from New York for Liverpool three weeks before the said agreement, and was at the time of the agreement expected to arrive at Liverpool within a week after, and that it had been published, and was believed amongst merchants at Liverpool, that the vessel was to arrive there in the course of the said voyage, and that the vessel was then performing such voyage, which was the voyage in this plea mentioned: that the plaintiffs had notice of the premises, and made the agreement with reference to the voyage in this plea mentioned, and under the belief that the Hottinguer had sailed from New York: that the Hottinguer had not at the time of the agreement, nor did she at any time, set sail on the voyage in the plea mentioned, but the proprietors of the said line of packet ships had, without the knowledge of the plaintiffs or the defendant, substituted another vessel for the Hottinguer, for the performance of the said voyage, which vessel afterwards arrived at Liverpool: by reason whereof the defendant refused to accept and pay for the flour:—*Held*, that the plea amounted to an argumentative denial of the contract set out in the declaration, and was therefore bad on special demurrer.

ASSUMPSIT.—The declaration stated, that, by an agreement made between the plaintiffs and the defendant, it was agreed that the defendant should buy of the plaintiffs, and that the plaintiffs should sell to the defendant, one thousand barrels of superfine Western Canal flour, to arrive at the port of Liverpool by a certain vessel called the Hottinguer, from New York, at the rate or price of 2*l.* 3*s.* 6*d.* for every one hundred and ninety-six pounds, the flour to be taken from the quay at the port of Liverpool; and that should the said vessel be lost before arriving at the said port of Liverpool, the sale should be void. The declaration then alleged mutual promises, and averred, that although the said vessel was not lost before arriving at the said port of Liverpool, and afterwards, and before the commencement of the suit, did arrive at the port of Liverpool from New York, having on board divers, to wit, one thousand barrels of superfine Western Canal flour, and the said flour was then landed on the said quay at the port aforesaid; and although the plaintiffs were ready and willing to deliver the said flour, yet the defendant would not accept or pay for the same.

Fifth plea:—That the said vessel called the Hottinguer, at the time of the making of the said agreement, was one of a line of packet ships sailing from New York to Liver-

pool, and from Liverpool to New York, at certain fixed periods, published and known beforehand amongst merchants and traders at Liverpool; and that the Hottinguer was, according to the ordinary course and times of sailing of the said line of packet ships, to have set sail from New York for Liverpool at a certain time, to wit, three weeks before the time of the making of the said agreement, and was, at the time of the making of the said agreement, expected to arrive at Liverpool within one week after the time of the making of the said agreement; and that, at the time of the making of the said agreement, it had been published, and was believed amongst merchants and traders at Liverpool, that the said vessel was to arrive at Liverpool in the course of the said last-mentioned voyage, and that the said vessel was then performing such voyage; and that the voyage in the course of which the said vessel was to arrive, as in the said agreement mentioned, was the voyage of the said vessel in this plea mentioned, and not any other or different voyage: that, at the time of the making of the said agreement between the plaintiffs and the defendant, the plaintiffs and defendant had notice of all the premises in this plea aforesaid, and made the said agreement with reference to the voyage in this plea mentioned, and under the belief that the Hottinguer had then sailed from New York to Liverpool on the said voyage: that the Hottinguer had not, at the time when the said agreement was so made, set sail, nor did she at any time set sail upon the said voyage in this plea mentioned, but, on the contrary thereof, the proprietors of the said line of packet ships had, without the knowledge of the plaintiffs or the defendant, before the time of the making of the said agreement, to wit, on &c., being the day when the Hottinguer was so to have set sail from New York, substituted another vessel for the Hottinguer for the performance of the said voyage which was so as aforesaid expected to be performed by the Hottinguer, and then caused the said other vessel to set sail from New

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York for Liverpool, instead of the Hottinguer; and which same vessel afterwards, and within a short time after the making of the said agreement, to wit, on &c., duly arrived at Liverpool: that, at the time of the making of the said agreement, the Hottinguer was at New York, without having any of the said barrels of flour on board, and did not take the said barrels of flour, or any of them, on board until a long time after the making of the said agreement, to wit, until &c., when the Hottinguer took the said barrels of flour on board, and set sail from New York to Liverpool, on another and different voyage from the voyage in the course of which the said vessel was expected to arrive as in the said agreement mentioned, and afterwards, to wit, on &c., arrived at Liverpool, with the said barrels on board, in the course of the said last-mentioned voyage; and by reason of the premises the defendant became entitled to refuse to accept and pay for, and did refuse to accept and pay for, the said barrels of flour. Verification.

Special demurrer, assigning for causes (amongst others) that it is not stated with sufficient certainty how the said agreement was made with reference to the voyage in the plea mentioned: and that the plea amounts to a denial of the agreement and promise as alleged (a). Joinder in demurrer.

(a) The defendant's chief points were—First, that, according to the true construction of the contract, he was only obliged to accept flour brought to Liverpool in the Hottinguer, in the course of the voyage the Hottinguer was performing, or was believed to be performing, at the time the contract was made; and that the plea shews that the Hottinguer never did arrive with flour in the course of that voyage. Secondly, that where a con-

tract is made to purchase goods to arrive at a particular port by a particular ship, the words used necessarily imply that some particular voyage is in the contemplation of the parties, in the course of which the ship is to arrive at the port named; and when the circumstances in which the ship is at the time the contract is made are shewn, the contract attaches to the particular voyage in which the ship is shewn then to have been engaged.

Cowling, in support of the demurrer.—The plea in substance is, that the contract was conditional on the performance of a particular voyage commenced on a particular day. According to that defence, if the vessel sailed a day later, though it arrived earlier, but not on that voyage, the contract would be void. The plea, then, amounts to the general issue, for it states a different contract from that set out in the declaration. The allegation in the plea, that the barrels of flour were not on board at the time the contract was made, is mere irrelevant matter. But even if the plea be not objectionable on the ground that it amounts to the general issue, it is bad as an avoidance by immaterial matter, for it only alleges that the parties made the agreement “*with reference to*” a particular voyage, and “*under the belief*” that the vessel had sailed. No precise meaning can be attached to those terms; there is no explanation of the grounds of belief, nor does the plea contain any allegation of fraud or misrepresentation. The declaration does not aver that any particular voyage was then believed to be in course of performance; therefore the plea, proceeding on that assumption, is bad. There is no ground for saying that a contract of this kind necessarily implies some particular voyage. The meaning is, that the defendant will receive the flour whenever a certain vessel, known to be at New York, shall arrive at Liverpool. Where the parties intend to limit the time, it is usual to do so in terms: *Alewyn v. Pryor* (a), *Lovatt v. Hamilton* (b). In contracts of this nature there is a double condition, namely, the arrival of the vessel, with the specified cargo on board: *Johnson v. Macdonald* (c). It is now sought to import a third condition, namely, the sailing of the vessel on a particular day.

Crompton, contra.—The plea is good. The contract is conditional upon the sailing of the vessel on the particular

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(a) R. & M. 406. (b) 5 M. & W. 639. (c) 9 M. & W. 600.

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voyage with reference to which the parties contracted. The plea shews that the vessel did not arrive on that voyage. Either the declaration is bad for not shewing the arrival of the vessel on that voyage, or the plea is good for shewing its non-arrival. Perhaps the plea may amount to an informal traverse of the arrival, but that objection is not specially pointed out. *Johnson v. Macdonald* (a) expressly decided that the words "to arrive" must be construed as a condition. That condition is not satisfied by the arrival of the vessel on any voyage at any time, but only on the particular voyage contemplated by the parties to the contract. As the price of goods continually changes, any delay might entirely alter the relation of the parties. [*Alderson, B.*—The plea refers to a voyage in which the vessel was then engaged: that is a different contract from that set out in the declaration.]

PER CURIAM (b).—There must be

Judgment for the plaintiff.

(a) 9 M. & W. 600.

(b) *Pollock, C.B., Alderson, B., Rolfe, B., and Platt, B.*

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WALKER, BARBER, and Another, v. MACDONALD.

June 8.

THIS was an action of debt by the indorsees against the indorser of a bill of exchange, dated the 21st October, 1846, and drawn by E. Bliss upon, and accepted by, J. Williams, for payment to the order of E. Bliss of 86*l.* 18*s.* 4*d.*, four months after date. The declaration stated, that E. Bliss indorsed the bill to J. Crowley & Co.; that J. Crowley & Co. indorsed the bill to S. F. Stevens; that S. F. Stevens indorsed it to Bartlett, Perrott, & Co.; that Bartlett, Perrott, & Co. indorsed it to the defendant, and that the defendant indorsed it to the plaintiffs. The defendant pleaded, first, a denial of the indorsement by him to the plaintiffs; secondly, a traverse of presentment for payment; and thirdly, no notice of dishonour.

The cause came on for trial before *Parke, B.*, at the Middlesex Sittings in Trinity Term, 1847, when a verdict was found for the plaintiffs for the amount of the bill and interest, subject to the opinion of the Court upon the following case:—

The plaintiffs produced and read at the trial the bill of exchange mentioned in the pleadings, and which was as follows:—

“86*l.* 18*s.* 4*d.*

“London, 21st October, 1846.

“Four months after date pay to my order eighty-six pounds, eighteen shillings, and fourpence, value received.

“(Per pron.)

“EDWIN BLISS.

“CHAS. JEFFRYS.

“To Mr. John Williams, brushmaker, Cheltenham.”

The indorsements were as follows:—

“Per proc. Edwin Bliss, Charles Jeffrys; James Crowley & Co.; Samuel F. Stephens; Bartlett, Perrott, & Co.

“Pay Messrs. Barber and Walker & Co., or order: W.

A bill of exchange, having been indorsed in blank, was afterwards indorsed by the defendant specially to “Barber and Walker & Co.” The plaintiffs, who carried on business under the respective firms of “Barber and Walker & Co.” and “The Eastwood Company,” indorsed the bill by the name of “The Eastwood Company.” The bill was duly presented, but payment refused for want of an indorsement by “Barber and Walker & Co. :”—*Held*, that, the bill having been indorsed in blank, its negotiability could not afterwards be restrained by a special indorsement, and that the presentment was such as to render the defendant liable on his indorsement to the plaintiff.

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Macdonald. *Barber and Walker & Co.* Per proc. of the Eastwood Company: Thomas Goodwill. Per proc., Nottingham and Notts Banking Company: Ade. Lasalle, pro manager.

“Pay Messrs. Omerod & Hardcastle, or order: Elliott & Cragg. Omerod and Hardcastle.”

There was also a reference, in case of need, at the bottom of the back of the bill, as follows:—“At Cunliffe’s.”

The above indorsement, in the name of “Barber and Walker & Co.,” was not on the bill prior to or at the time when it was presented for payment, but was written on the bill afterwards, under the circumstances hereinafter stated. The bill of exchange in question was drawn and indorsed as mentioned in the declaration, and was, previously to its being presented for payment as hereinafter mentioned, accepted by the drawee, payable at the London and Westminster Bank. The indorsement by the defendant to the plaintiffs was a special indorsement in the words and figures following:—“Pay Messrs. Barber and Walker & Co., or order. W. Macdonald.” When the bill became due it was in the hands of Messrs. Jones Lloyd & Co., bankers, of London, as holders thereof. The bill was presented on their behalf for payment, when due, at the London and Westminster Bank, and payment was refused by such bank, the answer then given by them being “No advice,” which is the usual answer when country bills are refused payment, and that answer was given at once, without referring to the indorsements. At the time of such presentment the indorsement “Barber and Walker & Co.” was not on the bill, but that indorsement was placed thereon, under the circumstances hereinafter stated; all the other indorsements above set out were on the bill at the time of the said presentment. After the dishonour, Messrs. Jones Lloyd & Co. took the bill to Messrs. Cunliffe & Co., but they refused to take up such bill, in consequence, as they stated, of the want of an indorse-

ment in the name of "Barber and Walker & Co." Due notice of dishonour was given to the defendant by the plaintiffs, and in due time. The defendant afterwards sent a letter to the plaintiffs, requesting them to write the indorsement of "Barber and Walker & Co." on the bill. The plaintiffs, after receipt and in consequence of that letter, wrote the indorsement of "Barber and Walker & Co." on the bill, in the manner in which the same now appears, as stated in this case, and immediately returned the bill to the defendant, who thereupon returned the same to the plaintiffs. The plaintiffs proved at the trial that they were the parties, and the only parties, constituting the several firms of Barber and Walker & Co., and the Eastwood Company, and that these firms respectively carried on the business of two separate collieries; but the business of both the said firms was carried on by the said plaintiffs at the same place of business in Nottinghamshire, and the object of using the names of the two firms was to keep the accounts of the two collieries distinct. The plaintiffs also proved that Thomas Goodwill, the party who indorsed the bill for the plaintiffs under the name of the Eastwood Company, was authorised by the plaintiffs to indorse bills for them, and was in the habit of so indorsing bills in the name of both firms. The following evidence was offered by the defendant, and objected to by the plaintiffs, and was received by the learned judge, subject to the opinion of this Court as to its being admissible, and is to be considered and treated as part of the case only in the event of the Court being of opinion that it was admissible evidence for the defendant. Several clerks in banking-houses in London were called for the defendant, and stated that it was the usage and custom of merchants, and of merchants and bankers, in London, that when bills of exchange were specially indorsed to any parties by a particular name or firm, the same name or firm should be used in the indorsement by such last-mentioned parties, and that it was the usage of London bankers not

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to pay bills indorsed by any parties in a different form or manner from that in which they had been previously indorsed to such parties, not even if the deviation was only in a single letter.

The question for the opinion of the Court is, whether the presentment of the bill, indorsed as above stated, was sufficient as against the defendant, and whether the defendant is liable to the present plaintiffs, under the circumstances in this action. If the Court shall be of opinion in the affirmative, the verdict for the plaintiffs is to stand for the amount of the principal and interest until final judgment. If the Court shall be of opinion in the negative, a nonsuit is to be entered; and either party, with the consent of the Court, is to be at liberty to convert this case into a special verdict.

Crompton argued for the plaintiffs (June 7th).—The defendant is liable upon his indorsement. The question arises on the presentment, which, it is said, cannot be good, because by custom London bankers do not pay bills unless the title is traced. But it is clear that Jones Lloyd & Co. might have given a valid discharge. [*Alderson*, B.—The presentment must be one which, on the bill being dishonoured, will make the defendant liable on his indorsement.] *Leonard v. Wilson* (a) expressly decided, that a party to whom a bill is specially indorsed may, by his indorsement, pass an interest in the bill, although he indorses by a wrong name. It is not true that in all cases a regular title must be shewn. Where a bill is indorsed to a married woman, an indorsement by her husband is good. A bill having been once indorsed in blank, no subsequent indorsee can restrain its negotiability by a special indorsement: *Smith v. Clarke* (b).

Bovill, for the defendant.—It is conceded, that where

(a) 2 C. & M. 589.

(b) 1 Peake N. P. C. 295.

there is a general indorsement the acceptor is bound to pay, notwithstanding a subsequent special indorsement, for, as against the acceptor, presentment is unnecessary. In the forms of declarations prior to the new rules, every statement, whether of the drawing, acceptance, or indorsements, was alleged to be "according to the usage and custom of merchants;" and it was averred, that by the indorsements the indorser "then and there ordered and appointed the sum of money in the bill of exchange specified, to be paid to the indorsee" (a). Here the defendant, by his indorsement, directs payment of the bill upon the order in writing of "Barber and Walker & Co." That order was never given. The declaration in substance alleges, that the plaintiffs presented the bill according to the tenor and effect of the defendant's indorsement to them; that the bill was not paid by the acceptor, and therefore the defendant became liable to pay it. The evidence shews that some other persons presented the bill. Though such presentment may be good as against the acceptor, it is not good as against the defendant. [Pollock, C. B.—In Byles on Bills (b) it is said, "If a bill be once indorsed in blank, though afterwards indorsed in full, it will still, as against the drawer, the payee, the acceptor, the blank indorser, and all indorsers before him, be payable to bearer; though, as against the special indorser himself, title must be made through his indorsee." The case of *Smith v. Clarke* was decided by Lord Kenyon, and I never heard it questioned in a court of law from that time to this.] The defendant cannot be charged, unless upon a presentment by a person making title through him.

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Crompton replied.

Cur. adv. vult.

POLLOCK, C. B., now said:—This was an action upon a

(a) Chit. Plead., p. 152, 5th ed.

(b) Page 109, 5th ed.

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bill of exchange, brought against the defendant, by whom it had been specially indorsed. Before that indorsement the bill had been indorsed in blank, and was therefore payable to bearer. It was decided, in the case of *Smith v. Clarke* (a), that when a bill has been so indorsed, and is payable to bearer, no subsequent holder can restrain its negotiability. That decision has always been considered to be a correct one, and has constantly been acted on. In the present case, the bill in question was indorsed to the plaintiffs specially; they indorsed it under another name of the firm, but that name did not correspond with the name in which the bill was indorsed to them. The bill was presented, and the answer was "No advice." Notice of the dishonour of the bill was given to the defendant, and then this action was brought against him. The pleas are, first, a denial of the indorsement. There is no doubt the indorsement, as laid, was proved, and therefore that plea offers no defence. The defence, if any, in truth arises upon the second plea, which is a denial of the presentment of the bill for payment. The question, therefore, is, whether the acceptor was bound to pay the bill upon that presentment; and we are all clearly of opinion that he was so bound. Upon referring to the cases, we find that of *Leonard v. Wilson* (b) to be expressly in point. The presentment in the plea, as was stated by my Brother *Alderson*, in the course of the argument, must be a presentment which will, upon the bill being dishonoured, make the defendant liable on his indorsement to the plaintiffs. What, then, is the promise to the plaintiffs? The promise is, that the indorser will pay to the indorsee, and those claiming under him, if the acceptor does not pay to a person entitled to call on him for payment of the bill when due. Here the presentment was by the holder, and the holder was entitled to claim from the acceptor. Upon the authority, therefore, of the case

(a) 1 Peake N. P. C. 295.

(b) 2 Cr. & M. 589.

decided in this court, and from the universally received opinion on this matter, we are all of opinion that our judgment must be for the plaintiffs. I may add, that I am not only stating what is the opinion of all the Court who heard the arguments, but also that of my Brother *Parke*, who tried the cause. As we entertain no doubt whatever upon the matter, and as the sum in dispute is so small that it would be absorbed by any further litigation, our judgment will be simply for the plaintiffs, and there will be no special verdict.

Judgment for the plaintiffs.

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SYMONDS v. DIMSDALE.

June 5.

THIS was a rule calling on the defendant to shew cause why an order of *Platt*, B., for a certiorari to the County Court of Oxford should not be rescinded, and why the writ of certiorari issued thereon should not be set aside, and a procedendo awarded.

It appeared from the affidavits, that on the 3rd of May a plaint was entered in the County Court of Oxford by the plaintiff, a horse-dealer at Oxford, to recover 10*l.* 9*s.* 6*d.* for the hire of horses and dog-carts by the defendant whilst resident in the University as an undergraduate. On the 20th of May the defendant gave notice, under the 76th section of the 9 & 10 Vict. c. 95, that a plea of infancy was filed. The plaintiff replied "necessaries," and, on the evening of the 23rd of May, served the defendant with notice that he intended to try the cause by a jury on the 26th. The 24th being the celebration of the Queen's birthday, no judge attended at Chambers; but on the 25th the defendant obtained the order of *Platt*, B., for leave to issue a certiorari to remove the plaint into this court, on the ground that the question as to what are necessaries for

A certiorari to remove a plaint from the county court, under the 9 & 10 Vict. c. 95, s. 90, may issue upon an ex parte application to a judge.

It is no objection to such writ that it is tested in the term prior to that in which it issued.

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an infant could not be fairly tried by an Oxford jury. No notice of the application was given to the plaintiff, and the proceedings at Chambers were entirely *ex parte*. The present rule was obtained on two grounds: first, that the plaintiff ought to have had notice of the intention to apply for the certiorari, so that he might have opposed it if he thought fit; secondly, that the writ was tested on the 12th of May (the last day of Easter Term), although not granted until the 25th (being vacation).

Whateley and *Barstow* shewed cause (June 14).—The principal question depends upon the construction of the 90th section of the 9 & 10 Vict. c. 95, which enacts, “that no plaint entered in any court holden under this act shall be removed or removable from the said court into any of her Majesty’s superior courts of record, by any writ or process, unless the debt or damages claimed shall exceed 5*l*., and then only by leave of a judge of one of the said superior courts, in cases which shall appear to the judge fit to be tried in one of the superior courts, and upon such terms, as to payment of costs, giving security for debt or costs, or such other terms, as he shall think fit.” Under a similar provision in other acts, the practice has been to grant a certiorari on an *ex parte* application: *Fox v. Veale*(*a*); and if a different construction be put on this enactment, it will in many cases be inoperative. [*Alderson*, B.—A defendant might have to serve the summons in Northumberland.] The section was not intended to limit the power of the judge to grant a certiorari, but to enable him to impose terms on the party applying for it. At common law a certiorari is grantable as of right. In *Landens v. Sheil*(*b*), *Littledale*, J., says, “I take it that every person is entitled to a certiorari, as he is to a writ of error, and the Court will take care that its process shall not be used for improper

(*a*) 8 M. & W. 126.

(*b*) 3 Dowl. P. C. 90.

purposes. Some years ago writs of error were more frequent than of late years; and there is no doubt that many of those sued out were in fact for the purpose of delay; but yet the Courts would not quash or set them aside, or permit execution to be sued out, unless there was an admission of the party, or something tantamount to it, that they were issued for the purpose of delay." The only exception seems to be that of a certiorari to a court of a county palatine (a). [*Alderson*, B.—That is only where execution cannot be obtained in the court of the county palatine, which has a limited jurisdiction. *Platt*, B.—A habeas corpus cum causâ, to remove a cause from the Palace Court, is obtained ex parte, and if improperly issued must be got rid of by a procedendo. *Pollock*, C. B.—In criminal cases these applications are always ex parte. *Alderson*, B.—A certiorari may issue to remove an indictment *thereafter* to be found.] In replevin the plaint is removed on an ex parte application.—As to the other point, there is no irregularity in the teste of the writ, because writs of this description are always supposed to issue in term. Before the Uniformity of Process Act it was common to date writs as of the previous term, although prior to the accruing of the cause of action.

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Keating, in support of the rule.—The object of the statute is, that except in a few particular cases, all claims of debt for less than 20*l.* shall be tried in the inferior court. The 90th section, therefore, provides that the general policy of the act shall not be defeated unless under certain circumstances, upon which the judge is to exercise his judgment, having all the facts before him. In the case of indictments the recognisance secures the prosecutor from any injury by the removal; and by the 5 & 6 Will. 4, c. 33, he is placed in the same situation as the defendant, and

(a) 2 Arch. Prac., p. 1155.

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cannot obtain a certiorari without motion in open court. Here the defendant should have applied for the writ when he was served with the summons from the county court, and not have lain by until he had notice of a trial by jury, and then obtained an ex parte order. The statute requires the judge to determine, first, whether the plaint ought to be removed; and secondly, upon what terms: and it is contrary to every principle that his judgment should be exercised on an ex parte application. [*Alderson*, B.—The question is, whether the enactment does not give the judge a discretion, which he will do well to exercise by hearing both parties. If they can be conveniently heard, it is at all times desirable that they should be. In many cases, however, it may be inconvenient: then does not the act give the judge a general power to allow a certiorari?] He must exercise a discretion, which can only be done by hearing both parties.—With regard to the second point, it is conceded that it cannot be supported. [*Platt*, B.—This Court follows the practice laid down in *Tidd's Prac.*, p. 403: “When a certiorari issues out of Chancery, it is an *original* writ, and may be tested at any time in term or vacation; but when it issues out of the King's Bench or Common Pleas, it is a judicial writ, and should be tested in term time.”]

Cur. adv. vult.

POLLOCK, C. B., now said:—In this case we think the rule ought to be discharged. The question turns upon the true construction of the 90th section of the County Courts Act, (9 & 10 Vict. c. 95), by which it is enacted, that “no plaint entered in any court holden under this act shall be removed or removable from the said court into any of her Majesty's superior courts of record, by any writ or process, unless the debt or damages claimed shall exceed 5*l.*, and then only by leave of a judge of one of the said superior courts, in cases which shall appear to the judge fit to be

tried in one of the superior courts, and upon such terms, as to payment of costs, giving security for debts or costs, or such other terms, as he shall think fit ;” and the point is, whether the expression, that the cause is only to be removed upon such terms as the judge shall think fit, necessarily imports that he must hear both parties before he issues the writ, and consequently that the defendant ought to have given a notice to the plaintiff of his intended application for the certiorari. We are, however, of opinion, that the application for that writ is an *ex parte* application, and that there is no necessity for a notice to the opposite party, but that the judge has a perfect right, if he pleases, to issue the writ on an *ex parte* application.

Generally speaking, the writ of certiorari is the right of the subject at common law ; and although that right is taken away in many cases by various acts of Parliament, and particularly so in large classes of cases where otherwise it might cause injury, we think that the analogy of the common law ought to be applied to the present case ; and as in other cases, where the defendant applies for a certiorari, the application is made *ex parte*, we think the authority of the judge to issue, and what is perhaps of more importance, the right of the subject to have, this writ, ought not to be taken away by any argument arising out of the use by the legislature of the words, “or upon such terms as to the judge shall seem fit ;” and, indeed, ought not to be taken away without either express words, or words clearly to that effect.

As to the imposing terms on the parties applying for these writs, we think that what was suggested yesterday in the argument was just, namely, that the intention of the legislature was not to fetter, but rather to enlarge the authority of the judge—that is, while permitting him to issue the writ *ex parte*, to enable him to fetter it with such terms as the nature of the case or the practice of the Courts (where any practice exists on the subject) may render proper. Thus, where such an application is made *ex parte*,

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The judge would naturally inquire when the writ was granted: and if it appeared that it had been granted some time back, and that the defendant would prevent the plaintiff from having his execution for a considerable period, the judge, while granting the writ to be issued, might of his own accord better it with the condition that the money should be brought into court the next point, or security given for costs, if such other terms as might naturally arise in his own mind, without the suggestion of any one else.

The ground of our decision, therefore, is, that by the general meaning of the common law, this writ is the right of the subject: and that there are no words to fetter the authority of the judge, or requiring that any other person than the applicant should appear before him. We think that, on the true construction of this clause of the statute, the writ may issue on an *ex parte* application, and consequently that the present rule must be discharged.

Rule discharged.

June 18.

MURRAY v. MANN.

The plaintiff sued for the defendant's horse, and recovered the price. The purchaser afterwards rescinded the contract on the ground of fraud, and was re-paid the purchase-money. In an action by the plaintiff for the keep of the horse—

Held, that the defendant could not set off the price as money received for his use, it having ceased to be so when the contract was defeated by the purchaser, although the defendant was ignorant of the fraud.

Any false statement knowingly made with a view to induce another to alter his condition, and thereby altering it, is a fraud in law.

THIS was an action by a livery-stable keeper for the keep of a horse, to which the defendant pleaded a set off for money received by the plaintiff for his use.

At the trial before *Purle*, B., at the London Sittings in this term, it appeared that the defendant had sent the horse to the livery stables of the plaintiff, where it stood for some time. The plaintiff at length sold the horse to a person of the name of Lilly for £25*l*, with a warranty that it was sound and free from vice. Lilly kept the horse for about

three weeks, and then returned it as vicious, and received back from the plaintiff the 125*l*. The defendant sought to set off that amount, on the ground that it was received for his use by the plaintiff. The learned judge, in summing up, told the jury, that, the plaintiff having made out his claim, it lay upon the defendant to get rid of it; and he did so by shewing that the plaintiff sold the horse for 125*l*., and received the money, which then became money had and received to the defendant's use. This cast upon the plaintiff the onus of shewing that he had lawfully paid back the money. In order to justify the plaintiff in returning the money, he was bound to make out, either that the money was repaid with the assent of the defendant (of which there was some evidence), or that the contract was void by reason of fraud. The mere breach of warranty did not entitle the purchaser to return the horse, unless that condition was annexed to the contract, or unless fraud had been practised upon him. If a person who sells a chattel warrants it of a certain quality, (which he knows it is not), with a view to increase the price, and in consequence of that falsehood obtains a higher price for it, it is both a legal and a moral fraud. It was for the jury to say whether the defendant had assented to the return of the money, instead of being held liable on his warranty; or, if not, whether the contract of sale was made under circumstances amounting to fraud; in either of which cases they must find for the plaintiff. The jury having found for the plaintiff,

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Humfrey now moved for a new trial, on the ground of misdirection.—The learned judge was wrong in telling the jury that the sale with a warranty, which the vendor knew was false, was a fraud in law. [*Parke*, B.—I left it to the jury to say, whether from the whole evidence they could infer fraud. *Platt*, B.—The facts to constitute fraud must be found by the jury; but whether certain facts as proved amount to fraud is a question of law.] There was no such

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fraud as prevented the property in the horse passing to the vendee. If any fraud were practised, it was by the plaintiff, and there was no evidence that the defendant had any knowledge of it. A guilty agent cannot set up his own fraud as a defence against the claim of his innocent principal. Suppose the money had been paid over by the plaintiff to the defendant before the horse was returned, and that afterwards the purchaser recovered back the price from the plaintiff on the ground of fraud, could the plaintiff then have recovered against the defendant? [*Parke, B.*—The rule of law is, that, if an agent is guilty of fraud in transacting his principal's business, the principal is responsible: *Cornfoot v. Fowke (a).*]

POLLOCK, C. B.—There will be no rule. The defendant claims the money by virtue of a contract made by his agent with a third party. That contract was defeasible by reason of fraud, and was put an end to by the vendee, so that the money does not belong to the defendant. In short, the defendant seeks to set off a sum of money received by the plaintiff; and it turns out, that, before the set-off can be made available, the plaintiff is compelled to pay back the money.

PLATT, B.—I am of the same opinion. If the defendant adopts the plaintiff's act, he adopts the fraud, and the effect of that fraud. He cannot say, "I adopt your contract so far as to make the money mine; but I do not adopt your contract in so far as it was by your fraud defeasible." If that were so, he might keep both the horse and the price, for the property in the horse re-vested in him when the contract was avoided by the purchaser.

PARKE, B.—I am of the same opinion. I directed the

(a) 6 M. & W. 358.

jury in conformity with the law as laid down in *Street v. Blay* (a). There was fraud, if, at the time of the sale, a warranty was given that the horse was sound, which induced the other party to enter into the contract, and if in the knowledge of the vendor that statement was false: for it was an untruth told to another with a view to induce him to alter his condition, and thereby altering it. The cases shew a distinction between legal and moral fraud. For instance, where a person purports to accept a bill of exchange by procuration, when in fact he has no such authority, that has been held a legal fraud, rendering the party liable to an action of deceit. In this case, in the absence of any other proof, there appears both legal and moral fraud. The plaintiff warrants the horse free from vice, knowing that the other party would not have bought it without a warranty, or believing the statement to be untrue. There is no doubt that, under such circumstances, when the statement turns out to be untrue, the vendee may recover back the price. I am perfectly satisfied that the jury had their attention directed to the state of the law and the facts. The other point, viz. that an agent cannot set up his own fraud against his principal, was not discussed at the trial, but certainly passed in my mind. The answer is, that the principal never had a right to the 125*l*, except by the act of his agent in making a contract which was defeasible by reason of fraud. It is true, that fraud does not make the contract actually void, but only voidable at the election of the party; but the moment the purchaser chose to declare it void, the price was recoverable back from the plaintiff, and it ceased to be money in his hands received for the use of the defendant. I am, therefore, clearly of opinion, that the set-off was defeated by the proof of fraud. The plaintiff does not, in truth, set up his own fraud against the defendant, but says, "I only received

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(a) 2 B. & Ad. 456.

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that money subject to a defeasance, which has taken effect." Independently, therefore, of the circumstance that the return of the horse was ratified by the defendant, I think there ought to be no rule.

PLATT, B., concurred.

Rule refused.

June 10.

PRICE and Others v. GROOM and Others.

INTERPLEADER issue, to try whether certain horses, claimed by the defendants as assignees under the bankruptcy of one Wiggins, and by the plaintiffs as trustees under a deed of trust for themselves and other creditors of Wiggins, were, on the 24th of July, 1847, the property of the plaintiffs, as against the assignees. At the trial of the issue, before *Parke, B.*, at the Sittings in the present Term, it appeared that Wiggins, who had, previously to the year 1844, been carrying on business as a horse-contractor, having become embarrassed, a meeting of his creditors was called; and that, in pursuance of an agreement then come to, a deed was executed on the 23rd of August, 1844, by Wiggins of the first part, the plaintiffs of the second part, and by the remainder of the creditors of the third part, by A., a horse-dealer and jobber, by a deed of trust, assigned all his stock-in-trade, &c. to certain trustees, for the benefit of his creditors, until all his then debts should be paid off, to hold on certain trusts, inter alia, that, so long as A. should observe the orders of the trustees, he was to be allowed to carry on and conduct the business, subject to their orders, but that they should have the power to determine his possession on his failing to observe their orders; that all monies received in the business were to be paid to the account of the trustees, and all monies paid by their cheques; and that A. was to receive a certain weekly salary. The creditors also advanced a large sum of money to carry on the business. The business was carried on by A. for some time, his name being over the door at the place of business, and he had dealings with various persons as if he carried on the business on his own account; but on his neglecting to observe the orders of the trustees, they determined his right to carry on the business, and he admitted, in writing, that they had a right to and did assume the possession of the stock-in-trade, &c. The trustees thereupon gave notice to the parties who had some of the horses, part of the stock-in-trade, that they belonged to them. Two days after this notice A. committed an act of bankruptcy. On an interpleader issue, to try whose horses these were—*Held*, that the deed did not create a partnership between A. and the trustees; that the trustees, by allowing A. to carry on the business in his own name, were not estopped from denying that the horses were A.'s; and lastly, that the horses were not in the possession, order, and disposition of the bankrupt at the time of the bankruptcy, within the meaning of 6 Geo. 4, c. 10, s. 72.

which Wiggins assigned to the plaintiffs, as trustees of the creditors, until such time as his debts to them should be paid off, all his stock-in-trade, &c., to hold upon certain trusts, inter alia, that, so long as Wiggins should observe the orders and directions of the plaintiffs, he was to be allowed to carry on the business, subject to the plaintiffs' orders; but if he should refuse or fail to comply with their orders, that in such case they should be at liberty immediately to determine the possession; that the plaintiffs should have power to sell and dispose of any portion of the stock they pleased; that all monies received in the business were to be paid into a banker's hands, and only drawn out by the cheques of the plaintiffs; and that Wiggins was to receive 5*l.* a week as wages for conducting the business. The creditors also agreed to advance a large sum of money, which was subsequently advanced. After the execution of the deed, Wiggins carried on the business under the orders of the plaintiffs, under the terms of the deed, and he accounted to them for the proceeds of the business. His name was written over the place of business, and different parties had dealings with him. In July 1847, it was discovered that Wiggins had accepted bills to a considerable amount, unknown to the plaintiffs; and at a meeting of his creditors, held on the 22nd of July, they gave him notice, by which they put an end to his carrying on the business. Upon the receipt of that notice, Wiggins made the following memorandum of admission:—"I hereby agree and admit, that, conformably with the provisions of the deed of trust, &c., the right has accrued to the trustees of determining and putting an end to their permission to my carrying on my trade and business mentioned in the said deed, and that they have exercised that right and put an end to that permission; and further, that, in obedience to such act of theirs, they have, with my leave, license, and assent, assumed the entire possession and control of the said trade, business, stock-in-trade," &c. At this time many of the

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horses belonging to the estate were in the possession of various persons, to whom Wiggins had, at various times, let them on job, in the way of his business; and these transactions had taken place between Wiggins solely in his own name and the several persons to whom the horses had been let, without any participation or interference on the part of the plaintiffs, whose names did not appear in the transactions. On the 22nd of July, the plaintiffs gave notice in writing to each of these parties, that the horses in their possession belonged to the plaintiffs, as trustees under the deed, and required them "not to part with the said horses, or any of them, nor to pay for the hire thereof, to any other person than the plaintiffs." On the 24th Wiggins committed an act of bankruptcy, upon which a fiat subsequently issued, and the defendants became assignees, and in that character made the claim to the horses in question. It further appeared, that between the time of the execution of the deed and the bankruptcy of Wiggins, some of the horses had been sold and others purchased, as well out of the monies advanced by the creditors as out of the incomings of the business, but all were so mixed up together that it became impossible to distinguish between the horses purchased after and those purchased before the deed. The sum realised by these horses, and all the stock-in-trade, amounted to much less than the sum due to his old creditors. It was contended, on the part of the assignees, upon this state of facts, that the property in the horses which were afterwards purchased did not pass to the plaintiffs under the deed; secondly, that, under the deed, the plaintiffs and Wiggins were partners; thirdly, that, as the plaintiffs had allowed him to carry on the business in his own name, they were estopped from saying that he was their servant only; and lastly, that, under these circumstances, the horses ought to be considered in the possession, order, and disposition of the bankrupt, under the stat. 6 Geo. 4, c. 16, s. 72. Upon the first point, his Lordship left it to the jury to say

whether there had been any appropriation of the horses purchased since the execution of the deed by the bankrupt to the trustees; and upon the other points he ruled in favour of the plaintiffs. The plaintiffs had a general verdict.

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Chambers now moved for a rule nisi for a new trial, on the ground of misdirection.—The property in these horses passed to the assignees, for they were left in the order and disposition of the bankrupt by the consent of the trustees. [*Alderson*, B.—But they were not so left at the time of the bankruptcy. *Parke*, B.—The apparent ownership ends immediately a party is informed and knows that the person in possession is not the real owner.] In the second place, upon the construction of the deed, there existed a partnership between Wiggins and the assignees. [*Alderson*, B.—There was to be no community of profit and loss between the parties at the same time, for immediately the interest of Wiggins was to commence, that of the trustees was to be at an end.] The interest of the bankrupt depends upon the prosperity of the concern; if there be sufficient to enable him to pay his creditors' debts and obtain a surplus, he is to be at liberty to retain that surplus. In *Grace v. Smith* (a), *Blackstone*, J., said, "I think the true criterion, where money is advanced to a trader, is to consider whether the profit or premium is certain and defined, or casual, indefinite, and depending on the accidents of trade." [He also referred to *Ex parte Dyster* (b).] In the last place, as the trustees held the bankrupt out to the world as the owner, they ought to be estopped from saying he is not. The principle is laid down in *Pickard v. Sears* (c) and *Gregg v. Wells* (d).

ALDERSON, B.—I am of opinion that there ought to be no rule. There are, as it appears to me, in reality only two

(a) 2 W. Bl. 998.

(b) 2 Rose, 256.

(c) 6 Ad. & E. 474.

(d) 10 Ad. & E. 90.

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questions in the present case. The first is, were the bankrupt and the trustees partners under this deed in the property in question?—and the other point is, was he in possession of them as reputed owner at the time of the bankruptcy? As to the last point: in the case of *Smith v. Topping* (a), which was tried before me, the true owner had permitted his goods to remain in the order and disposition of the bankrupt until the day before he became bankrupt, and then demanded the possession, which was refused; and I ruled that the goods did not pass to the assignees, and the Court of Queen's Bench upheld that ruling. Now here, the instant the trustees gave the parties who had the horses notice, that put an end to the reputed ownership. The remaining question is, who was the true owner of the property. It has been urged, that the bankrupt and trustees were partners in the business carried on under the terms of the deed. There was no community of profit and loss at one and the same time. There was, therefore, no partnership between the bankrupt and the trustees. Are then the trustees the true owners? It has been suggested, that the mode in which the business has been carried on has been such a holding out to the world as to have somewhat the complexion of a fraud, and that the trustees are estopped from saying, as against the future creditors of the bankrupt, that he was not the owner. I cannot agree with that proposition. The doctrine for which the defendants' counsel contends has no application whatever to the facts of this case. It seems to me that the bankrupt had no real property in the horses at the time of his bankruptcy, nor do I think that he had any apparent ownership at the time. I therefore think that the direction was perfectly correct.

ROLFE, B.—I am of the same opinion. By the deed of the 24th of August, the bankrupt assigned all his effects to

(a) 5 B & Ad. 674.

his trustees. There was no community of profit and loss, and I think it is clear there was no partnership created by that instrument. In the next place, it was endeavoured to shew that the property in question was in the order and disposition of the bankrupt. That doctrine cannot apply here, for, two days before the bankruptcy, the trustees gave notice to the different parties that the horses did not belong to Wiggins. I very much doubt whether goods in the possession of third parties can be said to be in the possession, order, and disposition of the bankrupt at all; in other words, whether a constructive possession of them is sufficient. It is however unnecessary to canvass that proposition, as it is impossible to contend in the present case that the property was in the bankrupt's possession, order, and disposition at the time of the bankruptcy, or, if it was, that it was so with the consent of the true owner.

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PLATT, B.—I am of the same opinion. I think it perfectly clear that Wiggins and the trustees were not partners, and that the property in question was not in the possession, order, and disposition of the bankrupt at the time of the bankruptcy, with the consent of the true owner.

PARKE, B.—I entertain the same opinion as I expressed at the trial. I thought the case was perfectly clear. The first question which arose at the trial was, whether all the horses were the property of the trustees. I thought, upon the authority of *Lunn v. Thornton* (a), that there was a doubt whether the horses purchased after the execution of the deed passed to the trustees, unless they had been afterwards appropriated by the bankrupt. I therefore left the question to the jury, to say whether the bankrupt had appropriated them; and the jury found that he had. That point therefore becomes immaterial in the consideration of

(a) 1 C. B. 379.

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the present question. It has been contended, that the trustees, by permitting Wiggins to deal with these horses as his own, are estopped from saying, as against future creditors, that they were not his; but that is carrying the doctrine laid down in *Pickard v. Sears* to an extent which that decision does not warrant. If the trustees entered into any stipulation that the future creditors should satisfy themselves out of the goods employed in the business, or had represented to such creditors that the bankrupt was really the party interested in the business, and upon that representation the creditors had dealt with him, they perhaps might have been estopped from afterwards setting up a different state of facts; but that is not the case here. It therefore seems to me that the argument fails on that point. I quite concur with what has fallen from the rest of the Court with respect to the question of reputed ownership, and with reference to the construction of the deed. I may observe, that not only in my opinion was there no partnership created by it, but that also, inasmuch as the assignees can only claim under the bankrupt as respects the actual ownership in the property, since the bankrupt admitted the property in his possession to be that of the trustees, the assignees cannot say that it does not belong to the trustees.

Rule refused.

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BRYMER and Others, Assignees of BROMLEY, a Bankrupt,
v. THE THAMES HAVEN DOCK AND RAILWAY COMPANY.

June 12.

COVENANT.—The declaration stated, that, before the said W. Bromley became bankrupt, by a certain deed then made and entered into between the said W. Bromley of the first part, one G. Dyer and Sarah Ann his wife of the second part, one P. Vaughan and the said W. Bromley (therein described as trustees under the marriage settlement of the said G. Dyer and Sarah Ann his wife) of the third part, and the Thames Haven Dock and Railway Company of the fourth part, after reciting that by a memorandum indorsed on one of certain particulars and conditions of sale, J. Jephson and E. Vaux, therein respectively described, on behalf of themselves and the other members of the committee of the then proposed Thames Haven Dock and Railway Company, agreed to purchase certain premises at the sum of 5000*l.*, and to complete the same agreeably to the conditions of sale, it was witnessed, that, in consideration of the sum of 2500*l.*, at the time of the execution of that agreement, paid to W. Bromley, with the consent of G. Dyer, Sarah Ann his wife, and P. Vaughan, and in consideration of the further sum of 2936*l.* 17*s.* 9*d.*, to be paid to W. Bromley &c., the said W. Bromley &c. agreed with the said company, the now defendants, to sell to them certain messuages and lands, in the said deed particularly mentioned; and that W. Bromley would, at his own expense, *deduce a good title* to the said hereditaments &c., and

A declaration in covenant stated, that, by a deed made between B. of the first part, D. and A. of the second part, V. of the third part, and a railway company of the fourth part, after reciting that J. and E., on behalf of the company, agreed to purchase certain premises, it was witnessed, that, in consideration of a certain sum, B. agreed with the company to sell them certain messuages and lands, and that B. would *deduce a good title* to the hereditaments, and the company agreed with B. to pay the sum. Averment, that B. became bankrupt, and the plaintiffs were his assignees; that both they and he were

willing to deduce a good title; that B. and all necessary parties were ready and willing to execute a proper conveyance of the said hereditaments to the company, and would have deduced a good title and have executed a proper conveyance, but that the company *discharged* them from deducing such title and executing such conveyance. Breach, that the company would not prepare such proper conveyance for execution, or pay the sum of &c. :—*Held*, on special demurrer, that it sufficiently appeared that the deed was sealed by the defendants; also that proffer was unnecessary.

Held, also, on general demurrer, that the word “discharge” must be understood as a discharge legally operative—that is, by deed.

Quære, whether the deducing a good title was a condition precedent to the plaintiffs’ right of action?

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that the said W. Bromley, and all other necessary parties, would, on or before &c., on payment by the company of the said sum of 2936*l.* 17*s.* 9*d.*, execute, and procure to be executed, a proper conveyance for conveying and assuring the fee simple and inheritance of and in the said hereditaments unto the said company; and the company thereby agreed with W. Bromley that they would, on or before &c., pay the said sum of 2936*l.* 17*s.* 9*d.* Averment, that W. Bromley became bankrupt, and that the plaintiffs were his assignees: that although W. Bromley, before he became bankrupt, and the plaintiffs, as his assignees after such bankruptcy, were respectively ready and willing to deduce a good title to the said hereditaments; and although W. Bromley, and all other necessary parties, were ready and willing, on payment by the company of the said sum of 2936*l.* 17*s.* 9*d.*, to execute a proper conveyance for conveying and assuring the fee simple of and in the said hereditaments unto the said company; and although W. Bromley, before he became bankrupt, and the plaintiffs, as assignees after such bankruptcy, would have deduced a good title to the said hereditaments, and W. Bromley, and all other necessary parties, would have executed a proper conveyance for conveying and assuring the fee simple aforesaid unto the company, of all which the company had notice, but that the company, on &c., *discharged* the said W. Bromley and the plaintiffs, as such assignees, from deducing such good title, and from the execution of such conveyance; yet the company did not nor would prepare such proper conveyance for execution, nor pay W. Bromley or the plaintiffs, as such assignees, the said sum of 2936*l.* 17*s.* 9*d.*

Special demurrer, assigning for causes, that it does not appear that the deed was ever sealed with the seal of the defendants, or that it was their deed: also, that the plaintiffs have not made profert of the deed, or shewn any excuse for their omission.

Aspland argued in support of the demurrer (June 9).—

First, it is not shewn that the deed was sealed by the company. It may be said that the term "deed" implies that the instrument was sealed; but there is a distinction between a party to a deed and a party chargeable by a deed. In *Buckeridge v. Flight* (a), where the question was whether it was necessary that an annuity deed should be executed by all the parties to it before a memorial was enrolled pursuant to the 53 Geo. 3, c. 141, *Abbott, C. J.*, says, "It is contended that no person is a party, within the meaning of the statute, until he has executed the deed. It is true that he is not, until that time, a party chargeable, but still he may be a party; and I take the expression in the statute to mean all such persons as, upon reading the deed, appear to be parties."—Secondly, there is no profert of the deed, nor any excuse alleged for its non-production. *Hodgson v. Warden* (b) shews that a party is not excused from profert by reason of the deed being in the hands of trustees, who refuse to allow him to bring it into court. *Gray v. Fielder* (c), indeed, decided that a party suing on a bond assigned by commissioners of bankruptcy need not make profert; but the Bankrupt Act then in force contained no clause similar to the 63rd and 64th sections of the 6 Geo. 4, c. 16, which vest in assignees all the bankrupt's estate, both real and personal, so that they are presumed to have the deeds in their possession. Though, in general, a party coming in by act of law need not make profert, yet, if the deed belongs to him, he must shew it, though he came to the estate by act of law: Com. Dig., tit. "Pleader," (O. 8), (O. 9).—Thirdly, there is no averment that the plaintiffs deduced a good title, or were excused from so doing; neither is it shewn at what time the discharge took place. It is consistent with this declaration that the offer to deduce a good title was only made when there was not sufficient time to enable the defendants to prepare a conveyance.

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(a) 6 B. & C. 49. (b) 13 M. & W. 22. (c) Cro. Car. 209.

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Cowling, contra.—First, it sufficiently appears that the deed was sealed by the company. It is stated to be a *deed between* the parties. The word “deed,” of itself, imports a sealing and delivery; and the word “between” includes the word “by.” In a note to the case of *Cabell v. Vaughan* (*a*) it is said, “There are some words of art, such as ‘indenture,’ ‘deed,’ or ‘writing obligatory,’ which, of themselves, import that the instrument *was sealed* by the party, without an averment of sealing. This declaration is framed according to the ordinary precedents, and is similar to those in *The Dean and Chapter of Bristol v. Guyse* (*b*) and *Thursby v. Plant* (*c*). Delivery of a deed is as necessary as sealing, yet it is never alleged that a deed was delivered. In *Atkinson v. Coatsworth* (*d*) it was resolved by the Court, that a “deed being set out as indentura facta inter the lessor and lessee, by which the lessee convenit et agreavit to pay the rent, that was an implicit averment of a sealing by him, within the reason of the case of *Taylor v. Dobbins* (*e*), where fecit notam suam was held to import a signing.”—Secondly, profert is unnecessary. No doubt, if the action had been brought by the parties themselves, or their executors, profert must have been made; but *Gray v. Fielder* (*f*) and *Jenkins v. Pearce* (*g*) clearly shew that the assignees of a bankrupt need not make profert, since they come in by operation of law. The 63rd and 64th sections of the 6 Geo. 4, c. 16, which empower the commissioners to convey the bankrupt’s estate to his assignees, are not new enactments; so that if *Gray v. Fielder* was ever law, it remains so still.—Thirdly, the stipulation as to deducing a good title is not a condition precedent. The agreement is, that W. Brown, and all other necessary parties, would, on pay-

(*a*) 1 Wms. Saund. 291, n. 1.

(*b*) Id. 103 a.

(*c*) Id. 230.

(*d*) 1 Str. 512.

(*e*) 1 Str. 399.

(*f*) Cro. Car. 209.

(*g*) 6 M. & W. 722.

ment by the Company, execute a proper conveyance; and it is averred that they were ready and willing to do so. The only condition precedent is the capacity of the parties to convey the estate. *Pordage v. Cole* (a) decided, that if it be agreed between A. and B., that B. shall pay A. a sum of money for his lands on a particular day, that is an independent covenant, and A. may bring an action for the money before any conveyance by him of the land. So, where, upon a sale of lands on the 25th of January, it was agreed that a draft of the conveyance should be delivered within three months from that date, it was held no condition precedent that the draft should be delivered by that day: *Lang v. Gale* (b). *Laird v. Pim* (c) is also an authority in point. But even if this stipulation be a condition precedent, the averment that the plaintiffs were ready and willing, with all necessary parties, to concur in executing a proper conveyance, is an implied averment of good title.

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Aspland, in reply.—First, the usual form of declaring, in cases like the present, is to state that the indenture was sealed with the seal of the defendant. In the note to *Cabell v. Vaughan* (d), it is said, “The law will not intend the other sealed the bond or deed, unless it be expressly averred that he did.”—Secondly, if the argument on the other side be correct, the title might be deduced after the conveyance was executed. There is nothing to shew that the plaintiffs were ready to deduce a good title at the time when the defendants could have tendered a conveyance: 1 Sugd. Vend. & Pur. 300 (e). Then, the discharge of the condition precedent ought to have been alleged to have been by deed. The obligation created by an instrument under seal can only be discharged by an instrument of

(a) 1 Saund. 319 l.

(d) 1 Saund. 291, n. 1.

(b) 1 M. & S. 111.

(e) Eleventh edition.

(c) 7 M. & W. 474.

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equal validity: *Davey v. Prendergrass* (a). The note to *Stennel v. Hogg* (b) shews, that, though the objection might have been cured by verdict, it is fatal on demurrer.

The Court intimated their opinion to be in favour of the plaintiffs on all the points, except that relating to the deduction of title; and that, on that point, they would take time to consider their judgment.

Cur. adv. vult.

POLLOCK, C. B., now said:—In this case, several causes of demurrer were assigned, all of which were disposed of at the time of the argument, except one, upon which the Court took time to consider, namely, whether the deducing of a good title was a condition precedent to the plaintiffs' right to bring this action. [His Lordship then stated the declaration.] We think, that, upon these pleadings, the averment, that "the Company discharged W. Bromley and the plaintiffs from deducing such title," must be understood as a discharge legally operative; that is, a discharge by deed. It therefore becomes unnecessary to determine whether the deducing a good title was a condition precedent or not. The defendant may have liberty to amend on the usual terms: otherwise,

Judgment for the plaintiff.

(a) 5 B. & Ald. 187.

(b) 1 Saund. 228 a.

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WEBSTER v. CROUCH and ARROWSMITH.

June 9.

ASSUMPSIT.—The declaration stated, that whereas, before the making of the promise, the plaintiff had divers dealings and transactions with the defendant Crouch alone, and also with Crouch and the defendant Arrowsmith; that divers claims and accounts remained unsettled between the plaintiff and the defendants; that the plaintiff had, for the accommodation of Crouch, accepted divers bills of exchange; and thereupon, to wit, on &c., in consideration that the plaintiff, at the defendants' request, then delivered to the defendants three acceptances, as follows: 16*l.* 6*s.* at two months, 21*l.* 15*s.* 2*d.* at three months, 26*l.* 7*s.* 11*d.*, dated the 7th of April, at five months, *as a full settlement of debts*, the defendants promised the plaintiff to return him the acceptances drawn by the defendant Crouch, as follows: 28*l.* 15*s.* and 28*l.*, and to pay the plaintiff the sum of 15*l.* towards a bill of exchange drawn by the defendant Crouch for 30*l.* 4*s.* 6*d.*, which would become due on the 10th of May, 1846. Breach, that the defendants did not nor would return the acceptances, or pay the plaintiff the 15*l.*

A declaration against O. and A. stated, that the plaintiff had divers dealings and transactions with C. alone, and also with C. and A.; that divers accounts remained unsettled between the plaintiff and defendants; that the plaintiff had, for the accommodation of O., accepted divers bills of exchange; and thereupon, in consideration that the plaintiff then delivered to the defendants three acceptances as follows: 16*l.* 6*s.* at two months, 21*l.* 15*s.* 2*d.* at three months, 26*l.* 7*s.* 11*d.*, dated the 7th of April, at five months, *as a full settlement of debts*, the defendants promised the plaintiff to return him the acceptances drawn by C., as follows: 28*l.* 15*s.* and 28*l.* Breach, that the defendant did not return

Special demurrer, assigning for causes, that no sufficient consideration was shewn for the alleged promise; that, for aught that appears, the acceptances delivered to the defendant may have been worthless; that the declaration was defective, in not stating the names of the parties whose acceptances were delivered to the defendants.—Joinder in demurrer.

J. Brown, for the plaintiff.—First, the declaration is bad for uncertainty. The contract is not connected with

the acceptances. On special demurrer, *Held* bad, for uncertainty.

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the inducement. What meaning can be attached to the words "as a full settlement of debts?" It does not appear whose debts they were, nor what was the amount of them. They may either have been the plaintiff's own debts, or the debts of third persons. If the former, there might or might not be consideration, since the giving acceptances is no consideration to support a promise, unless they are of an amount equal to the debts, and negotiable: *Sibree v. Tripp* (a): *James v. Williams* (b), *Cumber v. Wane* (c), 1 Smith's Leading Cases, 149 a. A failure of any part of the consideration would vitiate the whole: *Jones v. Waite* (d). Besides, it is not stated who are the acceptors of the bills. *Appelmans v. Blanche* (e) shews that the omission, in pleadings, of even the Christian names of parties to bills, is ground of special demurrer, unless excused by averment. There is this further objection, that the declaration only states an accord unexecuted, upon which no action will lie: *Lynn v. Bruce* (f), *Reeves v. Hearne* (g).

Manning, Serjt., contra.—The declaration shews a valid consideration for the defendants' promise. Whatever may have been the nature of the acceptances, the parties have agreed to treat the delivery of the paper on which they were written as a settlement of the debts. The consideration is, therefore, executed; and whether the acceptances were of any money value or not, the liability resulting to the plaintiff from their delivery is a sufficient consideration to support the promise. The words, "as a full settlement of debts," are surplusage, which is no ground of special demurrer: 1 Chit. Plead. 252. [*Alderson*, B.—Those words cannot be rejected as surplusage; and the nature of the debts should be stated with convenient cer-

(a) 15 M. & W. 23.

(b) 13 M. & W. 828.

(c) 1 Str. 426.

(d) 5 Bing. N. C. 351.

(e) 14 M. & W. 154.

(f) 2 H. Bl. 317.

(g) 1 M. & W. 323.

tainty. *Rolfe, B.*—There can be no difficulty in stating whose debts they are.]

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PER CURIAM.—The plaintiff may have liberty to amend: otherwise,

Judgment for the defendant.

CHERRY v. HEMING and Another.

June 9.

COVENANT.—The declaration stated, that, by indenture made the 31st of March, 1836, between the plaintiff, executrix of the will of J. Cherry, of the first part, G. Whieldon of the second part, J. Ratliff of the third part, and the defendants, of the fourth part, (profert): the plaintiff granted, bargained, sold, and assigned, and G. Whieldon, (as equitable mortgagee), and J. Ratliff, as legatee under the will of J. Cherry, assigned and released to the defendants certain letters patent, and the exclusive right and enjoyment of the invention therein mentioned: and the defendants covenanted with the plaintiff to pay her 840*l.* by instalments; (that is to say), 120*l.* on the 1st of April, 1837, 60*l.* on the 1st of April, 1838, and an instalment of 60*l.* yearly on the 1st of April in each year following: Provided always, that if, at the expiration of twelve months from the date of the in-

A declaration stated, that, by an indenture between the plaintiff and defendants, the plaintiff sold the defendants certain letters patent, and the defendants covenanted to pay the plaintiff 840*l.* by instalments; provided, that, if at the expiration of twelve months from the date of the indenture the defendants should not approve of the patent,

and of such their disapprobation, and intention to sell the patent, should give notice in writing to the plaintiff, the payment of the first instalment should be suspended; and if, having given such notice, the defendants should, within six months, sell the patent for the best price that could be obtained for the same, and, retaining to themselves 240*l.* and certain costs, pay over to the plaintiff the surplus (if any), the covenant for payment of the 840*l.* should cease; but if the defendant, having given such notice, should neglect or refuse to observe all the other matters and things in the proviso, the covenant for payment of the 840*l.* should stand. Averment, that the defendants gave due notice of their disapprobation of the patent, and of their intention to sell the same; that six months from the date of the notice had elapsed, and the defendants had not sold the patent. Breach, non-payment of the 840*l.* Plea, that the defendants were ready and willing, and endeavoured to sell the patent, but that no sale could be effected, and the same remained unsold, without any default, and against the will of the defendants:—*Held*, that the defendants, not having sold the patent, were liable to pay the 840*l.*, and therefore the plea was bad.

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denture, the defendants should not approve of the working of the patent, and of such their disapprobation, and of their intention to sell the patent, should give notice in writing to the plaintiff, such notice not to be given before the 1st of March, 1837, nor after the 31st of March, 1837, then and in such case the payment of the first instalment of 120*l.* should be suspended; and if, having given such notice, the defendants should, within six months after the date thereof, bonâ fide sell and dispose of the said letters patent to any person willing to purchase the same, for the best price that could be reasonably obtained, and by and out of the monies to arise from the sale, and all intermediate profits, should pay and satisfy all costs of such sale, and retain to themselves 240*l.*, being the amount paid by them, and all costs incurred in working the patent, and should pay over to the plaintiff the net surplus, if any, and, at the same time, render a true account in writing of the matters aforesaid, then and in such case the covenant and agreement for payment of 840*l.* should cease and determine. But, if the defendants should neglect to give such notice, or, having given such notice, should neglect or refuse to observe and perform all the other matters and things in the said proviso mentioned, then the covenant for payment of 840*l.* as aforesaid should be and stand in full force; and the said first instalment of 120*l.*, in case the same should have been suspended by the giving such notice as aforesaid, should, at the expiration of six calendar months from such notice, revive and be payable.

Averment—That the defendants gave due notice in writing of their disapprobation of the working and exercising the said letters patent, and of their intention to sell the same; that six months from the date of the notice elapsed before the commencement of the suit; and that the defendants had not bonâ fide sold the said letters patent, or rendered the plaintiff any account in writing of any sale

thereof, or of the costs, or of the net surplus. Breach, non-payment of any portion of the said sum of 840*l*.

Plea—That, after the giving the notice in writing to the plaintiff of the defendants' disapprobation of the working and exercising the letters patent, and of their intention to sell the same, and within and during the period of six months after the date and delivery of the said notice, the defendants were ready and willing, and endeavoured and offered to bonâ fide sell the said letters patent for the best price that could be reasonably obtained, by public auction; that no person would be or become a purchaser thereof, and no bonâ fide sale could be then effected; that, during the said space of six months, and at all times hitherto, the defendants have been unable to sell the same; that the said letters patent have remained unsold, without any default, and against the will of the defendants; that the defendants have not at any time been able to make any intermediate profit from working or exercising the letters patent, and the same have been, and were always, useless and valueless, and it has been impossible to sell and dispose of the same.

Special demurrer, assigning for causes, (amongst others), that, although by the covenant the defendants bound themselves to make the payments, except in the events specified in the proviso, yet the plea does not allege the happening of those events, but admits that those events failed, and merely alleges that the failure did not arise from the negligence or default of the defendants.—Joinder in demurrer.

T. Jones, in support of the demurrer.—The covenant is to pay a certain sum by instalments, unless the defendants should sell the letters patent within a given time. The plea in effect is, that the defendants, notwithstanding their endeavours, were unable to sell the letters patent.

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That is no answer to a breach of this covenant, which is in terms absolute, and restrained only by the proviso.

C. Pollock, contra.—Either the plea is good, or the declaration bad. The question resolves itself into this—namely, what is the true construction of the agreement? The parties evidently contemplated that the patent was valuable, or, if it should turn out otherwise, that the loss should be sustained between them. Suppose it had sold for 50*l.* only, would not the defendants in that case have been free from the payment of the instalments? If so, it could never have been intended that the defendants should be liable, though they could not sell at all. The proviso necessarily implies that some price should be obtained for the patent. Any other construction would be a great hardship on the defendants. The contingency upon which the covenant remains in force, is the *neglect* or refusal of the defendants to give notice, or, having given it, to perform the other matters mentioned in the proviso. That means a wilful neglect or refusal; but the plea shews that the defendants have done all in their power to sell the patent. The principle of the decision in *Harris v. Mantle* (a) is applicable to the present case.

T. Jones was not called upon to reply.

POLLOCK, C. B.—I am of opinion that the plea is bad, and that the plaintiff is entitled to judgment. The defendants' counsel argued, that it is to be considered as an implied term in the bargain, that, if the patent cannot be sold, it shall be the same thing as if it were sold. That would probably be so, if the patent were repealed by scire facias, by the interposition of some third person, or if this

(a) 3 T. R. 307.

were the case of a chattel that had been destroyed, because it is an implied condition that the subject-matter of the contract shall remain in specie. This plea does not disclose such a state of things, but only that, notwithstanding the efforts of the defendants, the patent could not be sold. It may be, that if they took more pains, or applied in another direction, or more largely advertised, they might have succeeded. The proviso is, that, if the defendants shall give notice, within a certain period, of their intention to sell the letters patent, the payment of the first instalment shall be suspended. They have given such notice; and the question then is, whether the plaintiff has a right to demand that instalment. That depends upon whether the defendants have complied with the rest of the agreement, which is, that if, having given such notice, they shall neglect or refuse to perform the other matters mentioned in the proviso, the covenant for payment of the 840*l.* shall stand in full force. If the words "neglect or refuse to perform the other matters" meant simply neglect or refuse to "offer for sale," the defendants would be right; but the meaning is, if they shall not do that which is mentioned in the previous part of the proviso, namely, "bonâ fide sell and dispose of the patent;"—not having sold it, they have rendered themselves liable to pay the instalments.

ALDERSON, B.—I am of the same opinion. The defendants have bound themselves by an indenture to pay a certain sum of money by instalments: then, in case the defendants shall disapprove of the working of the patent, there is an absolute power on their part to give notice at a period before the first instalment is payable, and the payment of it is suspended: then, if they shall do certain other acts, all payments in respect of the 840*l.* are to cease; but if they shall neglect to do those acts, the instal-

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ment suspended, and all others, are to continue in force. The condition upon which the payment of the 840*l.* ceases is, that they do certain acts. It is not averred that they have done those acts, but only that they endeavoured to do them.

ROLFE, B.—I am of the same opinion. I cannot see the hardship of our construction of the deed. This may be a bad bargain; but if the patent were valuable, the hardship would be the other way, for the plaintiff has no right to any part of the proceeds of the sale, unless it takes place within six months after the notice. Consistently with the language of this covenant, the defendants might, the day after the expiration of the six months' notice, sell the patent for 10,000*l.*, and pocket the whole, paying the 840*l.* by instalments as they became due. That shews that any other construction would be productive of the greatest injustice.

PLATT, B.—The defendants have covenanted to pay a certain sum of money by instalments; but the deed contains a proviso which avoids that covenant, in the event of their performing certain acts: they have not done those acts, and are therefore liable to pay the instalments.

Judgment for the plaintiff.

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MAY v. SEYLER.

June 13.

ASSUMPSIT on a promissory note, made by one Papanicolas, for payment to the defendant, or order, of 750*l.*, four months after date, and by the defendant indorsed to the plaintiff.

Plea—That the note was indorsed by the defendant, who then delivered the same so indorsed to Papanicolas, who then received the same for the purpose and on the understanding that the same should be used and negotiated for the taking up a bill of exchange accepted by the defendant for 1000*l.*; that Papanicolas, in violation of the said understanding and special purpose, used and negotiated the note, and transferred and delivered the same, so indorsed, to the plaintiff, for other and different purposes, and did not take up the said bill, and the plaintiff then took and received the same from him, in violation of and contrary to the said special purpose; and the defendant says, that there never was any consideration or value to him for his indorsement, and that there never was any value or consideration from the plaintiff to him or Papanicolas for the delivery or transfer of the note by Papanicolas to the plaintiff, or for the plaintiff's being the holder of the same.

Replication—That there was good value and consideration for the plaintiff's being the holder of the note, to wit, a large sum of money, to wit, the sum of 750*l.*: concluding to the country.

Special demurrer, assigning for causes, that, under the traverse taken by the replication, it was uncertain whether the plaintiff intended to rely at the trial on proof of consideration to Papanicolas, or the defendant, or some stranger; and that, if the traverse were considered to admit evidence of the plaintiff having given consideration

To an action by indorsee against indorser of a promissory note, for payment of 750*l.*, the defendant pleaded, that he indorsed the note to P. for a special purpose, and that P., in violation of that purpose, delivered it to the plaintiff, and that there never was any consideration or value from the plaintiff to the defendant, or P., for the transfer of the note by P., or for the plaintiff being the holder of the same. Replication, that there was good value and consideration for the plaintiff's being the holder of the note; to wit, a large sum of money, to wit, the sum of 750*l.* :—*Held*, on special demurrer, that the replication was good.

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to a stranger, the defendant would be taken by surprise.
 —Joinder in demurrer.

Phipson argued in support of the demurrer (June 12).—The plea affords a sufficient *prima facie* answer, by shewing that the bill was negotiated in violation of the special purpose for which it was indorsed, and that there was no value or consideration from the plaintiff to the defendant or Papanicolas. The replication ought, therefore, to have stated that the plaintiff gave value to the defendant, or to Papanicolas, or some intermediate holder. The defendant has no means of ascertaining from whom the plaintiff received the note, and what title that party might have to it. Possibly the plaintiff gave value to an indorser who obtained the note by theft or fraud, with the plaintiff's knowledge, and the defendant ought to have an opportunity of shewing the fact by way of rejoinder. The correct form of replication appears from the case of *Arbouin v. Anderson* (a).

Martin, contra (*Prentice* with him).—It is essential that the plea should negative all consideration; therefore, the meaning of the latter averment is, that there never was any consideration or value to any person whatever in respect of the note. The replication properly states that there was consideration. If the replication had set out the facts specially, shewing the nature of the consideration, and to whom given, it would have been inconsistent with the plea, and bad on special demurrer. In a note to the case of *Bennet v. Filkins* (b), it is laid down, that whenever any material fact is alleged in any pleading, which, if denied, will, upon issue joined, decide the cause one way or other, if the adverse party plead a matter

(a) 1 Q. B. 498.

(b) 1 Saund. 21, n. 2.

inconsistent with, and contrary to, such allegation, he *must* traverse it. A traverse may be either by a direct denial, or by an inducement of affirmative matter inconsistent with the previous pleading, and concluding with an *absque hoc*; and though, in *Wms. Saunders* (a), it is said that there are precedents either way, yet the general practice is simply to deny the allegation in the plea, concluding to the country. Before the rule of H. T., 4 Will. 4, r. 13, the special traverse concluded with a verification, which shews that such a form of replication would be improper in this case, since it would lead to unnecessary prolixity. In *Arbouin v. Anderson* (b), the plea was bad, and the plaintiff, not having demurred to it, was compelled to reply new affirmative matter. [*Pollock, C. B.*—In the case of the *Earl of Stirling v. Clayton* (c), the defendant pleaded in abatement, that the plaintiff was not the Earl of Stirling, and it was held, that the plaintiff, in his replication, was bound to shew how he claimed the dignity.] That case proceeded on the ground that a party pleading a dignity must shew how he has it. To a plea of no memorandum in writing, within the Statute of Frauds, the plaintiff may reply that there was such memorandum, without setting it out in his replication: *Wakeman v. Sutton* (d).

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Phipson replied.

Cur. adv. vult.

POLLOCK, C. B., now said :—In the case of *May v. Seyler*, we are all of opinion that the replication is good, and that the plaintiff is entitled to judgment. It was an action by the indorsee against the payee of a promissory note. The plea, in substance, stated, that the note was indorsed to one Papanicolas, for a special purpose, and that

(a) Vol. 1, 103 b, n. 3.

(b) 1 Q. B. 498.

(c) 1 C. & M. 241.

(d) 2 A. & E. 78.

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Papanicolas, in violation of that purpose, delivered it to the plaintiff, who was the holder without consideration. The plaintiff replied simply, that there was consideration, and to that replication there was a demurrer; and the point we took time to consider was, whether the plaintiff, when it became necessary to reply that there was consideration, could state it in these general terms. The case of the *Earl of Stirling v. Clayton* (a) was referred to, to establish the proposition, that where matter is denied by the defendant, and is affirmed by the plaintiff, he must go on to shew something more than a mere traverse of the negative. In the case mentioned, the plaintiff declared as Earl of Stirling; the defendant pleaded in abatement; that the plaintiff was not Earl of Stirling; and this Court then held, that the plaintiff, in his replication, was bound to shew *how* he claimed the dignity. That case proceeded on the ground, that, where a matter is peculiarly within the knowledge of one party, that party must state it in pleading. But, in the case of bills of exchange and promissory notes, the onus of proving want of consideration is cast on the defendant, unless the plaintiff's title be impeached in some way, as upon the pleadings. In the present case, there is nothing of that sort; and it is, therefore, sufficient for the plaintiff to reply as he has done; and we think that he is entitled to judgment. The defendant may, however, have leave to amend on the usual terms, by adding the similiter, otherwise there will be

Judgment for the plaintiff.

(a) 1 C. & M. 241.

1848.

TURNER v. THE METROPOLITAN LIVE STOCK COMPANY.

June 16.

IN this case a rule nisi had been obtained for leave to issue execution against one Louis De Droff, a shareholder in a joint-stock company, completely registered under the provisions of the 7 & 8 Vict. c. 110. It appeared that the plaintiff had obtained a judgment against the Company for 287*l.* 8*s.* 2*d.*, and that the Company had no property or effects upon which the same could be levied. The motion was made upon a certified copy of an extract from the schedule of the deed of settlement of the Company, returned to the Registry-office, containing the names of the subscribers and the number of shares held by each, in which De Droff was stated to be the holder of three hundred shares.

The return of the names of shareholders in a joint-stock company, pursuant to the 7 & 8 Vict. c. 110, is *prima facie* evidence of the fact of the parties named in the return being shareholders, so as to justify the Court in allowing execution to issue against them under the 66th section of that act.

Bramwell shewed cause.—It does not sufficiently appear that De Droff is a shareholder for the time being, or that he was a shareholder at the time of the contract entered into, so as to render him liable to an execution under the 66th sect. of the 7 & 8 Vict. c. 110. The return made by the Company to the Registry-office is not evidence against any person whose name is contained therein, without proof that he authorised the return. The 14th and four following sections relate to returns to be made by companies completely registered; but the only effect of those enactments is to regulate the mode in which the returns are to be made, and in what way they are to be authenticated. The certified copy is evidence that a return has in fact been made, but no more. Under this statute, a shareholder has not the protection of a *scire facias*. [*Platt*, B.—No injustice can be done, as the party sought to be charged may deny that he is a shareholder: in the absence of such denial, the return is evidence that

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he is.] The registrar has no power to inquire whether the persons, whose names are mentioned in the return, are shareholders or not; his duty is to register the list sent to him. [*Alderson*, B.—He acts in the discharge of a public duty; therefore, *primâ facie*, the return is evidence.] The 5th section of the 7 Geo. 4, c. 46, for regulating banking copartnerships, requires the return under that act to be verified on oath; and the 6th section renders a certified copy of the return evidence of the fact, that all persons named therein as members of the copartnership were members thereof at the date of the return. [*Alderson*, B.—The question is, whether the certified copy is sufficient evidence to induce the Court to act upon it. We constantly act on information and belief, because the other party has an opportunity of denying it].

Gray appeared to support the rule, but was not called upon.

PER CURIAM (*a*).—The rule must be absolute.

Rule absolute.

(*a*) *Pollock*, C. B., *Alderson*, B., and *Platt*, B.

THE ROYAL MAIL STEAM-PACKET COMPANY v. ACRAMAN
and Others.

1848.

May 8.
June 2.

THIS was an action of assumpsit, brought under an order of the Chief Judge in Bankruptcy. The declaration contained the common counts for money paid and money had and received. The defendants pleaded, *inter alia*, non-assumpsit; upon which issue was joined. It was part of the order, that the bankruptcy should not be pleaded. The action was tried before the Lord Chief Baron, at the London sittings after Trinity Term, 1846, when a verdict was found for the plaintiffs, subject to the opinion of the Court upon a case, of which the material part is as follows:—The Royal Mail Steam-packet Company was incorporated by charter, dated 26th September, 1839. Upon the 1st May, 1840, an agreement was made and signed by the plaintiffs and by all the defendants, except J. Franklyn, by which the defendants undertook to build two steam-ships, with steam-engines and boilers, according to specification, to be completed and ready for delivery within fifteen months from the date of the contract. The price of each, including equipments, was to be 50,500*l.*, to be paid as follows:—9000*l.* upon signing the contract; 11,200*l.* on the 5th May, 1840; 20,200*l.* on the 5th August; 20,200*l.* on the 5th November; 20,200*l.* on the 5th February, 1841; and 20,200*l.* on the delivery of the two vessels. It was further agreed that:—"In case default shall be made in any of the conditions and agreements instalments having been paid, and A. & Co. not being able to complete the ships, another agreement was made with the firm of A. & Co., including F., whereby the Company, in terms of the first contract, arranged to take possession of the ships and complete them, and for that purpose to take into their employ the workmen of A. & Co.; and, as a security to the Company for any advances they might make beyond the balance receivable by A. & Co., it was agreed that the Company should have a lien for such balance upon certain shares of A. & Co. in the Company. The Company having proceeded with the works, and for that purpose made large advances—*Held*, that they could not forthwith recover such advances by action against the firm of A. & Co., including F., for money paid or money had and received, there being no liability to repay until the ultimate balance was ascertained, and then only after demand.

A. & Co. agreed with a certain Company to build for them two steam-ships within a stated time, the price to be paid by instalments; provided that, if A. & Co. should make default in any of the conditions of the agreement, it should be lawful for the Company to take possession of the ships, and cause the works to be completed by any persons they chose, and pay those persons such reasonable sums as agreed upon, and that A. & Co. should forthwith, on demand, pay the Company all sums so advanced. Afterwards F. became a partner in the firm of A. & Co., and four

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herein contained, it shall be lawful for the Company to take possession of the steam-ships, steam-engines, and boilers, which, from and after the payment of the first instalment, shall be and be deemed, in every respect and for every purpose, the property of the Company, and to cause the works agreed to be done to be completed by any person or persons whom they shall see fit to employ, using such of the materials of T. Holroyd and his partners, (the firm of Acraman & Co.), as shall be then on their premises, and shall be fit and applicable to the purpose; and that it shall be lawful for the Company to pay such persons such reasonable sum or sums as they shall see fit to agree upon in that behalf; and that the said J. Holroyd or his partners shall *forthwith on demand* pay to the said Company all sums of money which the Company shall so pay or advance, the said Company, in that case, nevertheless, paying or allowing to the said J. Holroyd and his partners, on the final completion and fixing of the several steam-ships, steam-engines, and boilers, the amount of the contract price, deducting therefrom any sum which (if the directors shall consider that the Company have, by the default of the said J. Holroyd and his partners, sustained any damage) any two persons, one to be appointed on behalf of the Company, and the other on the part of the said J. Holroyd and his partners, shall award."

Under this contract, the firm of Acraman & Co., which, before the 31st December, 1840, consisted of all the defendants except Franklyn, and after that day, on which Franklyn became partner, consisted of all the defendants, proceeded with the building of the two steam-ships, engines, and boilers. The Company paid the firm of Acraman & Co. (consisting of all the defendants except Franklyn, before the 31st December, 1840, and of all the defendants after that date) 80,000*l.*, the amount of the first four instalments, at the times agreed; but the vessels were not completed within the stipulated period. In February, 1842,

the defendants informed the Company that they could not proceed with the completion of the vessels without assistance, and the following arrangement was agreed upon between the plaintiffs and the defendants:—

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“Bristol, 26th February, 1842.

“Messrs. Acraman & Co. not having completed the ships and engines in terms of their contract with the Royal Mail Steam-packet Company, of the 1st May, 1840, the Company, in terms of that contract, have arranged to take possession of the ships and engines in the state in which they now are, and of the materials now upon the premises of Messrs. Acraman, Morgan, & Co., which have been provided for their completion, and to proceed themselves to complete them. For that purpose, the Company have agreed to avail themselves of the assistance of Messrs. Acraman & Co., and to take into their own employ such of the workpeople at present in the service of Messrs. Acraman & Co. as they may require; Messrs. Acraman & Co. hereby agreeing to allow the Company the use and occupation of their premises, and of all tools and machinery now in or about the same, so long as the same shall be required for the completion of the ships and engines. And, as a security to the said Company for any advances they may make beyond the balance which will be receivable by Messrs. Acraman & Co. under their contract with the Company, the undersigned, W. Edward Acraman and A. John Acraman hereby agree that the Company shall have a lien for such balance upon the 600 shares now held by the said W. Edward Acraman and A. John Acraman in the said Royal Mail Steam-packet Company.

“ACRAMAN, MORGAN, & Co.

“W. EDWARD ACRAMAN.

“ALFRED JOHN ACRAMAN.”

The Company thereupon took possession of the unfinished

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ships and other things, and proceeded to complete the ships and other works, with the assistance of the defendants and their workmen, under the inspection of an inspector nominated by the Company on their behalf. The defendants' foreman made weekly returns to the Company's inspector of the necessary disbursements in wages and other expenses. After these had been checked by the inspector, the necessary sums were advanced weekly to the defendants, upon receipts prepared by the solicitor of the Company, in the following form:—

"Bristol, 5th March, 1842.

"We acknowledge to have received from the Royal Mail Steam-packet Company the sum of 1500*l.*, being on account of the expenses incurred by them in completing the ships and engines contracted for by us, and which sum so paid by them is to be *debited against the balance* receivable by us under the said contract.

"Per proc. Acraman & Co.,

"GEORGE MORGAN."

The advances to the defendants thus made by the Company amounted in the whole, prior to the 16th June, 1842, to the sum of 21,486*l.* 8*s.* 7*d.* A fiat in bankruptcy was issued against all the defendants, bearing date the 16th June, 1842, and gazetted the 1st July. Between the 16th June and the 1st July the Company made further payments to the defendants, in like manner, to the amount of 2346*l.* 15*s.* 1*d.* The Company completed the vessels in April, 1843.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover the whole or any part of those sums in this action.

Crowder, for the plaintiffs.—The question is, whether, on the 17th June, 1842, there was a *debt* due from the de-

defendants to the plaintiffs, which the latter are entitled to recover in the present form of action. It is submitted, that the money which the plaintiffs advanced, in order to complete the vessels, in pursuance of the agreements of the 1st May, 1840, and the 26th February, 1842, is recoverable in an action on the common counts. At the time the first agreement was made between the parties, Franklyn, who is one of the defendants, was not a partner with the other defendants. He is to be considered as having become a partner with them on the 1st January, 1840. There can be but little doubt, that, if the original partnership had remained unchanged, and the original agreement alone existed, the plaintiffs would be entitled to succeed in this action. The words in the first agreement, that Holroyd or his partners shall forthwith *on demand* pay to the Company any sums the latter should so pay or advance, do not require any actual demand to be made to enable the Company to recover such sums of money so advanced. The case resembles that of a promissory note, payable on demand—there no actual demand is necessary: the bringing the action is a sufficient demand. Then, by the second agreement, Franklyn, who had entered into partnership with the other defendants, adopts the terms of the previous agreement. He also enjoys the benefits and profits which would arise to his co-partners from its adoption. The terms contained in the second agreement will be relied upon by the defendants. Those terms are, that, as a security to the said Company for any advance they may make beyond the balance which will be receivable by Messrs. Acraman & Co. under their contract with the Company, the defendants agree that the Company shall have a lien for such balance upon certain shares in the Company then held by the defendants for 1500*l*. The receipt of the 5th March, 1842, given by the defendants, which states that the sum so paid by the Company is to be *debited* against the *balance* receivable by

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the defendants under the contract, means a debt on one side of an account. The true meaning of the second contract is not that the money advanced should not be paid until after a balance should be ascertained. Such, therefore, being the fair and reasonable construction which the two contracts should receive, and as Franklyn enjoyed the benefits of both, and by the terms of the second acceded to the first, and as the money was advanced by the plaintiffs in pursuance of these contracts, they are entitled to recover in the present form of action; and there is no good reason why the form of action should be a special one for the recovery of damages incurred to the plaintiffs for breach of contract on the part of the defendants.

Tomlinson (Butt with him), for the defendants.—No debt for which this action is maintainable was due from Acraman & Co. to the plaintiffs on the 17th June, 1842. They could only maintain a special action on the contract after demand: *Lightfoot v. Creed* (a). The stipulations contained in the first agreement are not embodied in the second, which has reference to a different state of things. Under the first agreement, the Company had to exercise an option as to whether they would, in a certain event, complete the ships with their own capital, or require Messrs. Acraman to finish them. In the latter case there would be no claim; in the former, only after demand. The first agreement contemplates that Acraman & Co. would always be in a condition to supply the capital. The new contract proceeds upon the basis that the Company are to have the benefit of the skill of Acraman & Co.; and, in order to prevent the property vesting in assignees, in the event of bankruptcy, it is arranged that the Company shall take possession of the ships, under the terms of the first agreement. On the one side, advances are to be made;

(a) 8 Taunt. 268.

on the other, instalments will become payable: and a balance having been struck, the shares are to stand as a security for advances beyond it. The clause in the first agreement, which provides for the repayment of sums advanced, is not inserted in the second, the terms of which are inconsistent with such a stipulation. Where there is an antecedent debt, no doubt the bringing the action is a sufficient demand: *Birks v. Trippet* (a). But it is otherwise where the party has an option to exercise before his right of action is perfect: *Simpson v. Routh* (b). But, even if a demand were made, it would be of no avail against Franklyn, who never entered into the first contract: *Atkinson v. Bell* (c).

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Crowder replied.

POLLOCK, C. B.—The case lies in a narrow compass, the real question being, what is the effect of the agreement of the 26th February, 1842, to which the defendant Franklyn was a party? Does that agreement contemplate advances to be made by the plaintiffs, which were to be recoverable *forthwith*? In order to determine the question, we must look merely at that agreement. Then what do the parties agree to? They recognise the right of the Company to take possession of the ships and engines on the terms of the former contract, and the Company agree to avail themselves of the assistance of Messrs. Acraman & Co., and to take into their own employ such of the work-people then in the service of Messrs. Acraman as they may require, Messrs. Acraman agreeing to allow the Company the use of their premises; and, as a security for advances the Company might make beyond the balance, they are to have a lien on certain shares. The question then is, did Franklyn ever agree *forthwith* to repay advances made

(a) 1 Saund. 33 b. (b) 2 B. & C. 682. (c) 8 B. & C. 277.

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from time to time by the Company, so as to render those advances a debt recoverable instantly? I cannot come to any such conclusion; on the contrary, in my opinion, the effect of the agreement is, that the Company are to go on building the ships, employing the workmen of Messrs. Acraman as the servants of the Company; and it is only on the ultimate balance being ascertained, that any liability to pay arises. The Company are placed in this dilemma. If Franklyn and the other parties did agree not only that the Company should take possession of the ships upon the terms of the former agreement, but also that the former agreement should be incorporated with the latter, still a demand would be necessary to constitute a right of action. Therefore, in no view are the plaintiffs entitled to recover; for either this money is not payable at all until the balance is ascertained, or, if it be payable, then a demand is required by the terms of the agreement.

ROLFE, B.—I am of the same opinion. This action is for money paid, and money had and received; and I think the action cannot be maintained, because the sums advanced are not money paid for the defendants, or money had and received for the use of the plaintiffs. By the receipt of the 5th March, 1842, the defendants acknowledge that they have received from the Company 1500*l.* on account of the expense incurred in completing the ships, which sum is “to be debited against the *balance* receivable under the contract.” It is important to see, distinctly, the ground upon which the parties are proceeding. At the time of the original transaction the firm of Acraman & Co. did not consist of Franklyn, and the plaintiffs enter into a contract with that firm, whereby the latter agree to build certain ships, and the plaintiffs agree to pay the price by instalments. Acraman & Co. commence building the ships, and four instalments are paid prior to the 31st December, 1840, on which day Franklyn became a

partner. The case would be rendered more clear, if we suppose, that, from the 31st December, 1840, the firm of Acraman & Co. consisted of Franklyn alone. On the 5th February, 1841, another instalment is paid; but the defendants are unable to complete the vessels. Now, the Company had stipulated that, in case of default, it should be lawful for them to take possession of the ships, and to complete the works by any persons whom they should think fit to employ, and to pay such persons; and that Acraman & Co. should *forthwith on demand* pay to the Company all sums which they should so pay in advance. The Company do take possession of the ships and go on with the works, which they have since completed. Then, what are their rights?—to bring an action against the parties with whom they contracted, not Franklyn, for a breach of that contract; and the measure of damage would be the difference between the instalments which remained to be paid, and the sum which they had expended in order to complete the ships. The Company clearly contemplated that they might be driven to make large advances, and look to the firm of Acraman & Co. for payment out of the balance; and therefore they stipulate that it shall be lawful for them to pay the persons employed such reasonable sums as they shall see fit, and that Acraman & Co. shall “*forthwith on demand*” repay the sums so advanced. If it were necessary to decide the point, I should say, that, supposing there was no new partner, it is obvious that the agreement gives no right to maintain an action for money paid, or money had and received, unless on demand, for those words are an essential part of the contract. It would be absurd to say that the Company might spend money in building the ships, and bring an action without informing Acraman & Co. of what had been spent. The Company could only recover after demand, if there had been no alteration in the firm of Acraman & Co. I will now assume that the firm consisted of Franklyn alone: then the plain-

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tiffs take possession of the ships, under the original contract and the agreement to which Franklyn was a party, and employ Franklyn's workmen. At the end of the first week the Company expend 1500*l.*, and Franklyn signs a receipt, in which he acknowledges that he has received that amount, "to be debited against *the balance* receivable by him under the contract." Franklyn in effect, says, "You had a right to take possession, and you have taken possession; you had a right to employ whom you chose of my workmen; I acknowledge the receipt of that sum, to be debited against what is eventually coming to me;" that is, part payment of the balance receivable under the contract, not money paid for the defendant's use. If the plaintiffs chose to advance more than was eventually coming to the defendant, possibly there might be evidence to support an action for money had and received; but the plaintiffs had not made such advances at the time this action was brought.

PLATT, B.—I am of the same opinion. On reading the document signed by Franklyn, I do not see how the present action can be maintained. Whether that document involves all the terms of the previous agreement, it is not necessary to inquire, because the stipulation clearly is, that the balance must be ascertained before the plaintiffs can claim any advances; and, inasmuch as that time has never arrived, the present action cannot be maintained.

REGULA GENERALIS.

Trinity Term, 11 Vict.

WHEREAS, by a rule of Easter Term, in the 7th year of the reign of her present Majesty, Queen Victoria, it was ordered, "That, for the future, it shall not be necessary to have a warrant of attorney to acknowledge satisfaction of a judgment, or a judge's fiat thereon, but that it shall be requisite only to produce a satisfaction-piece similar to that in use in the Court of Queen's Bench, except that in all cases such satisfaction-piece shall be signed by the plaintiff or plaintiffs, or their personal representatives, and such signature or signatures shall be witnessed by a practising attorney of one of the courts of Westminster, expressly named by him or them, and attending at his or their request, to inform him or them of the nature and effect of such satisfaction-piece before the same is signed, and which attorney shall declare himself, in the attestation thereto, to be the attorney to the person or persons so signing the same, and state he is witness as such attorney; but any judge at Chambers shall have power to make an order, dispensing with such signature of the plaintiff or plaintiffs, or their personal representatives, under special circumstances, as he may think right; and that, in cases where the satisfaction-piece is signed by the personal representative of a deceased plaintiff, he shall prove his representative character in such way as the Master may direct:" IT IS ORDERED, that so much of the said rule as requires a satisfaction-piece similar to that in use in the Court of Queen's Bench to be produced, be revoked, and that the following form of satisfaction-piece be in future used, in lieu of the same:—

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"In the —

— Term, in the — year of the reign of Queen Victoria.

—, to wit. Satisfaction is acknowledged between — plaintiff, and — defendant, in an action — for — and —. And — do hereby expressly nominate and appoint —, attorney-at-law, to witness and attest — execution of this acknowledgment of satisfaction.

"Judgment entered on the — day of —, in the year of our Lord 18—.

"Roll No. —

"Signed by the said —, in the presence of me —, of —, one of the attornies of the Court of — at Westminster. And I hereby declare myself to be attorney for and on behalf of the said —; expressly named by h—, and attending at h— request, to inform h— of the nature and effect of this acknowledgment of satisfaction, (which I accordingly did before the same was signed by h—); and I also declare that I subscribe my name hereto as such attorney.

(Signature.)

—, the above
 named plaintiff
 (Date) 18—"

(Signed)

DENMAN,

THOS. WILDE,

FRED. POLLOCK,

E. H. ALDERSON,

J. PATTESON,

J. T. COLERIDGE,

T. COLTMAN,

W. H. MAULE,

WM. WIGHTMAN,

C. CRESSWELL,

F. T. PLATT,

W. ERLE.

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SITTINGS AFTER TRINITY TERM.

THOMAS WATSON and ELIZABETH SPENCE v. PEARSON.

July 11.

ASSUMPSIT.—The declaration stated, that, by an agreement of the 5th September, 1845, the plaintiffs agreed to sell, and the defendant to purchase, certain land and premises for a certain sum of money; and the plaintiffs (inter alia) agreed to deduce a good title thereto. The declaration averred, that, although the plaintiffs did deduce a good and sufficient title in fee simple of, and in, and to the said premises, so as to enable the plaintiffs to convey the same to the defendant, &c., of which the defendant had notice, yet the defendant would not complete the purchase, and that he had not paid the said sum of money, &c.

The defendant pleaded, that the plaintiff did not deduce a good and sufficient title in fee simple of, in, and to the said premises, so as to enable the plaintiffs to convey the same to the defendant in fee simple, modo et formâ. After issue joined, by consent and by order of *Platt*, B., the following case was stated for the opinion of the Court:—

William Spence, at the time of making his will, hereinafter set out, and thence to his death, was seised in fee

A testator, by his will, dated the 26th July, 1825, devised as follows:—"I give and devise unto my wife E., to W. H., and J. C., their heirs, executors, and administrators, all my real and personal estates whatsoever, upon trust to pay the rents, interest, and produce thereof unto my said wife during her lifetime, and after her decease to pay and apply the rents, issues, and profits thereof for and towards the maintenance of my children during their lives, with benefit of survi-

vorship; and, after their several deceases, I give and devise the share of her so dying unto her children and unto his or their heirs, as tenants in common. I give, direct, ordain, and appoint unto my said wife E., to W. H., and J. C., their heirs, executors, and administrators, power and authority to sell, dispose of, mortgage, lease and otherwise in all manners manage my estate, both real and personal, as if I were living. I appoint my wife E., and W. H. and J. C., the executors of this my will, and also guardians of my children." The testator died in 1825, leaving his widow E. (one of the plaintiffs) and three infant daughters unmarried, the youngest of whom died in 1844; and the eldest in 1832 married, and had several children living at the date of the hereinafter-mentioned contract of sale. J. C. never acted under the will, and, in 1833, executed a deed disclaiming all interest under the will. The other party, W. H., died in 1840. In 1845, E., the testator's widow, entered into a contract to sell certain land of which the testator was seised in fee simple at the time of his death:—*Held*, in an action by E. against the vendee for the recovery of the purchase-money, that she took an estate in fee simple in the land in question, and could therefore give a good title.

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of the messuages, lands, tenements, and real estate in his will mentioned, which comprised, amongst others, an undivided moiety of the messuages, lands, and tenements in the declaration mentioned. He made his will on the 26th July, 1825, which was duly executed to pass real estate, and is as follows:—

“ This is the last will and testament of me, William Spence, of Sculcoates, in the city of York, brewer, made this 26th day of July, 1825. I give and devise unto my dear wife Elizabeth, William Hall, of Sculcoates aforesaid, Esq., Joseph Clarke, of the town of Kingston-upon-Hull, Gent., their heirs, executors, and administrators, all my real and personal estates whatsoever, upon trust to pay the rents, issues, and produce thereof unto my said wife during her life, and from and after her decease to pay and apply the rents, issues, and profits thereof for and towards the maintenance of my children during their respective lives, with benefit of survivorship, and from and after their several deceases, I give and devise the share of her so dying unto her children, and his or their heirs, as tenants in common; and if only one of my children shall leave issue, I give and devise the whole of my said real and personal estates unto the heirs, executors, and administrators of such of my said children; and if all my said children shall die without issue under age (but at age I vest their legacies), then I give and devise the same unto and equally between my two brothers-in-law, the sons of my father, in equal shares, as joint tenants. I give, ordain, direct, and appoint unto my said wife Elizabeth, the said William Hall, and the said Joseph Clarke, their heirs, executors, and administrators, power and authority to sell, dispose of, mortgage, lease, or otherwise in all manners manage my estate, both real and personal, as if I were living; and I exonerate purchasers from seeing to the application of any purchase-money for which they or any of them may give a receipt. I appoint my said wife Eliza-

beth, and the said William Hall and Joseph Clarke, the executors of this my will, and also the guardians of my said children; and I revoke all former wills by me made. In witness whereof I have hereunto set my hand and seal, the day and year first before mentioned.

“WILLIAM SPENCE.

“Signed, sealed, &c. in the presence of us, C. R. A., R. C., S. H.”

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Mr. Spence died on the 5th August, 1825, leaving his widow, who is one of the present plaintiffs, and three unmarried daughters, who were then of the ages of seventeen, fourteen, and eleven, him surviving; viz. Mary, Jane, and Caroline. The latter departed this life on the 7th of October, 1844; and in the month of March, 1832, the said Mary Spence married William Ouston, of the town of Kingston-upon-Hull; and there have been issue of this marriage several infant children living at the date of the contract of sale hereinafter mentioned, and still living.

The said Joseph Clarke never acted under the will, but on the 13th April, 1833, executed the following deed, disclaiming all interest under the will:—

“To all to whom these presents shall come, Joseph Clarke, of &c.—Whereas William Spence, late of the parish of Sculcoates, in the county of York, brewer, duly made and published his last will and testament, bearing date the 21st of July, 1825, whereby he gave and devised unto his wife Elizabeth, William Hall, of Sculcoates aforesaid, Esq., and to the said Joseph Clarke, their heirs, executors, and administrators, all his real and personal estates whatsoever, upon certain trusts therein mentioned, and the said testator appointed his said wife Elizabeth, and the said William Hall and Joseph Clarke, the executors of his said will; and whereas the said William Spence departed this life on or about the 5th day of August, 1825, without having revoked or altered his said

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will, which was duly proved in the — Court of York, on &c., by the said Elizabeth Spence and the said William Hall, the said Joseph Clarke having renounced probate thereof; and whereas the said Joseph Clarke having declined to act in the said executorship, or to accept the trusts of the said will, hath agreed to execute the present disclaimer thereof. Now know ye, that he, the said Joseph Clarke, doth, by these presents, absolutely and irrevocably disclaim all the real and personal estates, trusts, powers, and authorities whatsoever, in and by the said recited will of the said William Spence devised and bequeathed or given to him, along with the said Elizabeth Spence and William Hall, their heirs, executors, and administrators as aforesaid; and the said Joseph Clarke doth hereby covenant and declare, that he has not accepted the devise and bequest contained in the said recited will of the said William Spence, nor any of the trusts and authorities thereby given or reposed in the said Joseph Clarke as aforesaid; nor hath he done, or permitted or suffered to be done, or been party or privy to the doing of any act, deed, matter, or thing whatsoever, which can or may be devised or construed an acceptance thereof, or whereby, or by reason or means whereof, the real and personal estates of the said testator are, can, shall, or may be vested in him, or in any wise impeached, charged, affected, or incumbered, in title, estate, or otherwise howsoever.

“In witness whereof, &c.

“JOSEPH CLARKE.”

The said William Hall died on or about the 28th day of November, 1840. On or about the 5th of February, 1845, the plaintiffs entered into a contract to convey to the defendant, for valuable consideration, the messuages, lands, and tenements in the declaration mentioned, (of the other undivided moiety of which the said plaintiff Thomas Watson was seised in fee); but the defendant objected, that the plaintiffs could not, under the circumstances, make a good title in fee simple to a pur-

chaser for valuable consideration to the moiety of the said messuages, lands, and tenements devised by the will of the said William Spence.

The question for the opinion of the Court is, whether the plaintiffs can make a good title in fee simple to a purchaser for valuable consideration to the moiety of the said messuages, lands, and tenements devised by the will of the said William Spence; if they can, the parties agree that judgment shall be entered for the plaintiffs for the sum of 20*l.*; and, if not, that a *nolle prosequi* shall be entered.

The case was argued in the sittings after last Easter Term (May 15th and 16th), by

Tomlinson, for the defendant.—The question for the opinion of the Court arises upon the construction to be put upon the terms of a very obscure will, the question being, whether the plaintiffs can make a good title to an estate which they have sold to the defendants. It is submitted, that they cannot. Here, one of the trustees having died, and the other disclaimed, the surviving trustee cannot make a good title to the estate. In *Townsend v. Wilson* (a), a power of sale was reserved to three trustees and their heirs; one of the trustees died, and the two surviving trustees executed a power of sale: and it was held, that the power was not well executed, although the deed expressly provided that the money arising from the sale should be entrusted to the trustees for the time being, and although it also reserved a power in case of death, &c., to appoint new trustees. In *Hall v. Dewes* (b), Lord *Eldon* said, that he did not agree with the decision in the preceding case, and that “it must be understood that he proceeded on the ground that he could not compel the purchaser to accept the title, for he should be sorry to have it recorded that he agreed to that case.” It would seem, that

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(b) 1 Jac. 189.

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his Lordship's decision went rather upon the ground, that the title was not marketable, than that it was absolutely bad. In Sugden on Powers, 6th edit., Vol 2, p. 490, there are the following remarks upon these two cases: "There was more difficulty in deciding against the title in *Hall v. Dewes*, than there was in *Townsend v. Wilson*; for, in the former case, the remainder in fee was vested in the trustees, to sell, and it is clear that the survivors or survivor of the trustees could have sold without the concurrence of the heirs of the deceased trustees. The power of sale and exchange directed to be inserted, was with the consent of the three, *their heirs or assigns*, seeming, therefore, to require the consent of the very persons in whom the previous trust for sale was reposed; and the other expressions in the articles strongly confirmed this view. But if the articles imperatively required new trustees to be chosen upon every vacancy, then Lord Eldon's opinion depended upon that clause, which, in effect, disabled surviving trustees from acting in the power of sale until the number was complete." The same remarks are to be found in the 7th edition of the same work, Vol. 2, p. 465. In *Bradford v. Belfield* (a), it was held, that a trust for sale, vested in A. and his heirs, could not be executed by an assign of A. In that case, the Vice-Chancellor held the decision in *Townsend v. Wilson* to be binding. Unless the power is given to the surviving trustee, he cannot make a good title: Dyer, 177 a, (32). [He also referred to Dyer, 219 a, (8).] In Co. Litt. 113. a., in a note to the position of Littleton, that, in a certain case, the executors may sell after the death of their testator, it is said—"Here it appeareth that the executors, having but a power, as Littleton putteth the case, to sell, they must all join in the sale. Then put the case, that one dies, it is regularly true, that, being but a bare authority, the survivors cannot sell. But if a man deviseth his land to A. for term of life,

(a) 2 Sim. 264.

and that, after his decease, his land shall be sold by his executors generally (as Littleton here putteth his case), and make three or four executors, and during the life of A. one of the executors dieth, and then A. dieth, the other two or three executors may sell, because the land could not be sold before, and the plural number of the executors remains. But if they had been named by their names, as I. S., I. N., I. D., and I. G., his executors, then, in that case, the survivors could not sell the same, because the words of the testator could not be satisfied; and I myself knew this case adjudged." There is this distinction between a class named generally, to whom the power is entrusted, and individuals pointed out specifically by name. The remarks in Sugden on Powers, 7th edit., Vol. 1, p. 144, may be referred to on this branch of the subject. Even supposing the devise to be to trustees in fee, still the power could not be exercised without the concurrence of the trustee who has renounced.

In the next place, the trustees do not take an estate in fee simple, but only a chattel interest. In *Doe d. White v. Simpson* (a), a testator devised lands, arrears of rent, and a bond and judgment to trustees and the survivor, and the executors &c. of such survivor, in trust, out of the rents and profits of the said estates and arrears, &c. to pay certain annuities for lives, and a sum in gross; and from and after payment of the said annuities and money, the testator devised successive estates for lives, remainder to M. in tail, remainder to his own right heirs; and he also gave a general power of leasing to the trustees, for the best rent, with an allowance of 10*l.* a-year each for their trouble; and it was held, that the purposes of the trust being all answered by the death of the annuitants, and the raising of money for legacies, the remainder-man in tail (the life estate being spent) took a legal estate in the premises; for where the purposes of

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(a) 5 East, 162.

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a trust may be answered by giving the trustees a less estate than a fee, no greater estate shall pass to them *by implication*; but the uses in remainder limited on such lesser estate so given to them, shall be executed by the statute. *Hawker v. Hawker* (a), and *Doe d. Budden v. Harris* (b) are also authorities to shew, that trustees are to have no greater estate than is necessary for the trusts. In *Doe d. Player v. Nicholls* (c), *Bayley, J.*, said—"It may be laid down as a general rule, that where an estate is devised to trustees for particular purposes, the legal estate is vested in them as long as the execution of the trust requires it, and no longer; and therefore, as soon as the trusts are satisfied, it will vest in the person beneficially entitled to it." So in *Barker v. Greenwood* (d), *Parke, B.*, says—"There is no doubt that the general rule of law is, that wherever there is a limitation to trustees, although with words of inheritance, the trustees are to take only so much of the legal estate as the purposes of the trust require." The following cases may be referred to:—*Doe d. Shelley v. Edlin* (e); *Doe d. Cadogan v. Ewart* (f); *Adams v. Adams* (g); *Ware v. Polhill* (h); and the cases referred to in 2 Sugden on Powers, 6th edit., p. 49. The reasons given may be, in some instances, artificial. It is therefore submitted, that the plaintiffs could not give a good title to the moiety of the estate in question, as they took only a limited interest, with a power of sale.

Cowling, for the plaintiffs. — It is submitted, the fee simple in the moiety of the property of the testator passed to the trustees by the will in question. The testator commences his will by stating, that he devises all his real and personal estate to the parties therein named, to them and *their heirs*, and he names them executors. They

- (a) 3 B. & A. 537.
- (b) 2 D. & R. 36.
- (c) 1 B. & C. 342.
- (d) 4 M. & W. 429.

- (e) 4 Ad. & E. 582.
- (f) 7 Id. 636.
- (g) 6 Q. B. 860.
- (h) 11 Ves. 257.

clearly take all the personal property. If the case rested there, the legal estate would also pass. Is there anything in the will to limit this? This is not an estate by implication. It is clear that they must have the legal estate to some extent. The trustees, their heirs, &c. have power to sell, dispose, and mortgage, lease, or otherwise in all manners manage the testator's estate, both real and personal, as if he were then alive. These powers are very extensive. There is nothing to shew any limitation as to time. The cases quoted on the part of the defendant are clearly distinguishable from the present. In *Doe d. White v. Simpson* (a), there were no words giving a fee. The decision there was, that the Court could not imply a fee. Assuming the case of *Hawker v. Hawker* (b) to have been rightly decided, it is not like the present. In Sugden on Powers, 7th edit., Vol. 1, p. 128, this decision is questioned. It is there said—"It has always been considered, that a devise to trustees and their heirs, upon trust, in a given event to sell, or to do any other act which may require the inheritance, vests the legal fee in the trustees, and they cannot, upon the construction of any subsequent devise, be held to take merely a power, for that would defeat the express devise to them. This will was not alluded to in the late case of *Hawker v. Hawker*, nor does the attention of the Court appear to have been called to it." The cases of *Doe v. Nicholls* (c), and *Doe v. Harris* (d), are also clearly distinguishable. Here the trusts require that the fee should pass, otherwise the trustees might lose the estate when the exigencies of the trust would be most in need of it.

In the second place, the disclaimer of one of the parties does not affect the plaintiffs' title. A devise to certain parties is a devise to those who do not choose to disclaim. [On this point he cited Sugden on Powers, 7th edit., Vol. 1, p. 46.]

(a) 5 East, 162.

(b) 3 B. & A. 537.

(c) 1 B. & C. 336.

(d) 2 D. & R. 36.

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In the third place, it may be contended, that the powers are remote. At all events, they are good for the time. The authorities on this point are conclusively in the plaintiff's favour: 2 Sugden on Powers, 7th edit., p. 470. The main question, however, in the case is, whether the surviving trustee can make a good title. It appears to be admitted by the defendant, that the authorities do not seem to proceed upon any broad ground on this point; and that, in many cases, the Courts have, to a certain extent, frustrated the intention of testators. Here the power (so called) is to be exercised by the same parties as were to have the legal estate. In *Jones v. Price* (a), a testator appointed three persons and *their respective heirs and assigns* his executors, and gave to them and to their *respective* heirs and assigns all his real and personal estates, in trust for the purposes after set forth; and first, that they and their *respective* heirs and assigns should sell his real estates; and he empowered them and their *respective* heirs and assigns to convey the estates, and to give receipts for the consideration money. He then requested the executors of his will to sell his farming stock, furniture, &c.; and out of the monies so arising, and all other portions of his personal estate, he required them *and their respective heirs and assigns* to pay all his debts, &c. One of the trustees and executors died. The two survivors agreed to sell the real estates. The Court, in a suit for a specific performance of the agreement, rejected the word "*respective*," and held, that the two surviving trustees and executors could sell and convey the estates to the purchaser, and that the debts were charged on the proceeds of the real estates, and, consequently, that the receipt clause was unnecessary. [He also referred to *Howarth v. Smith* (b).] The case of *Townsend v. Wilson* (c) is distinguishable from the present. The trustees there had a mere power, which was given by *deed* to the three

(a) 11 Sim. 557.

(b) 6 Sim. 161.

(c) 1 B. & Ald. 608.

and *their* heirs. In *Hall v. Dewes* (a), Lord *Eldon* held, that the question turned on the construction of marriage articles, and that, in the then existing state of the authorities, he could not compel the purchaser to take the title. The case of *Bradford v. Belfield* (b) is also distinguishable from the present. [He also cited 2 Sugden on Powers, 7th edit., p. 467].

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Tomlinson replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—This was a special case, the only point being, whether the plaintiffs could make a good title to an estate which they had agreed to sell to the defendant. The question turns entirely on the construction to be put on the will of William Spence, the husband of the plaintiff, Elizabeth Spence. The will was dated on the 26th of July, 1825, and is as follows:—"This is the last will and testament of me, William Spence, of Sculcoates, in the county of York, brewer, made this 26th day of July, in the year 1825. I give and devise unto my dear wife Elizabeth, William Hall, of Sculcoates aforesaid, esquire, and to Joseph Clarke, of the town of Kingston-upon-Hull, gentleman, their heirs, executors, and administrators, all my real and personal estates whatsoever, upon trust to pay the rents, interests, and produce thereof unto my said wife during her life, and, from and after her decease, to pay and apply the rents, issues, and profits thereof for and towards the maintenance of my children during their respective lives, with benefit of survivorship; and, from and after their several deceases, I give and devise the share of her so dying unto her children, and his or their heirs, as tenants in

(a) 1 Jac. 189.

(b) 2 Sim. 265.

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common; and, if only one of my children shall have issue, I give and devise the whole of my said real and personal estates unto the heirs, executors, and administrators of such of my said children; and, if all my said children shall die without issue under age (but at age I vest their legacies), then I give and devise the same unto and equally between my two brothers-in-law, the sons of my father, in equal shares, as joint-tenants. I give, ordain, direct, and appoint unto my said wife Elizabeth, the said William Hall, and the said Joseph Clarke, their heirs, executors, and administrators, power and authority to sell, dispose of, mortgage, lease, or otherwise in all manners manage my estate, both real and personal, as if I were living; and I exonerate purchasers from seeing to the application of any purchase-money, for which they or any of them may give a receipt. I appoint my said wife, Elizabeth, and the said William Hall and Joseph Clarke, the executors of this my will, and also the guardians of my said children; and I revoke all my former wills by me made."

The testator died soon after the date of his will, leaving the plaintiff, Elizabeth Spence, his widow, and leaving three infant daughters, one of whom died in 1844, and another of whom has married, and has issue several infant children. Clarke, one of the trustees, never acted, but, on the 13th of April, 1833, executed a deed of disclaimer, disclaiming all the devises and bequests contained in the will. William Hall, another of the trustees, died in 1840, and, in September, 1845, the plaintiffs contracted to sell the estate in question to the defendant. It is admitted, that the plaintiff Watson is seised in fee of one moiety, and that the testator was, at the date of his will, and thenceforth up to his death, seised in fee of the other moiety. The question therefore is, whether the plaintiff, Elizabeth Spence, can make a good title to the testator's moiety?

On the part of the defendant, it was argued, that she cannot. It was contended, that though the devise was of

all the testator's real and personal estate to the trustees, their heirs, executors, and administrators, yet the objects of the trust were not such as to require a fee simple; and so that the trustees took only a limited interest, namely, an estate during the lives of the widow and children, with a power of sale appendant; and, secondly, if this were so, then that the power could not be executed so as to give a valid title by reason of the death of Hall and the disclaimer of Clarke. We are of opinion, however, that the defendant's objection cannot be sustained. It is certainly true, that where the purposes of the trust on which an estate is devised to trustees are such as not to require a fee in them; as for instance where the trust is to pay annuities, or to pay over rents and profits to a party for life, there, if, subject to the specified trusts, the estate is given over, the parties taking under such devise over have been held to take legal estates: the estate given to the trustees (even when given with words of inheritance) having been in such cases taken to have been meant to be co-extensive only with the trust to be performed. This rule of construction has probably created much more difficulty than it has obviated. It is however too well settled to be now called in question. But we do not think it is applicable to a case like the present. The general rule is, that where an estate is given to trustees, all the trusts which they are to perform must, *primâ facie* at least, be performed by them by virtue and in respect of the estate vested in them. Here the interest derived is in terms at least an interest in fee simple. One of the duties imposed on the trustees is, if they should deem it expedient, to sell the estate. This they can only do by exercising dominion over the fee-simple; and in such a case, even without words of inheritance, there would be strong reason for holding that they were intended to take the fee. But it is not necessary here to go that length. The fee is in terms devised to them, and it would be a very

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strained and artificial construction to hold, first that the natural meaning of the words is to be cut down because they would give an estate more extensive than the trust requires, and then, when the trust does in fact require the whole fee simple, to hold that that must be supplied by way of power, defeating the estate of the subsequent devisees, and not out of the interest of the trustees.

The present case very closely resembles that of *Doe d. Cadogan v. Ewart* (a), where the trustees were held to take the fee. The only authority at all at variance with the view we take on this subject is that of *Hawker v. Hawker* (b). But in the facts of that case there were some peculiarities, and, no reasons being given for the certificate, we are unable to ascertain the principle on which the Court proceeded.

Taking it, therefore, that the fee vested in the trustees, it follows necessarily, that Elizabeth Spence, as the sole trustee, can sell in pursuance of the trust. For whatever be the doubts in case of powers, there is no question but that, in case of a devise to trustees upon trust to deal with the estate in a certain manner, the trust is *prima facie* to be executed by the trustees or trustee for the time being. Here, by the disclaimer of Clarke and the death of Hall, Elizabeth Spence has become the sole trustee, and may therefore well execute her trust by selling the estate.

There must therefore be

Judgment for the plaintiffs.

(a) 7 Ad. & E. 636.

(b) 3 B. & Ald. 537.

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FAULKNER v. RICHARD LOWE (a).

June 12.

COVENANT.—The declaration stated that, in the lifetime of one Robert Lowe, to wit, on the 29th of September, 1841, by a certain indenture then made between the defendant of the one part, and the plaintiff and the said Robert Lowe, since deceased, of the other part (profert), reciting, that the defendant and the plaintiff and the said Robert Lowe were possessed of, and interested in, divers monies on a joint account, and that the defendant had requested the plaintiff and the said Robert Lowe to lend and advance thereout to him, the defendant, the sum of 1600*l.*; the defendant, for himself, his heirs, executors, &c., covenanted with the said Robert Lowe and the plaintiff, their heirs, executors, &c., that he, the defendant, his heirs, executors, &c., would pay, or cause to be paid, the sum of 1600*l.*, with interest for the same after the rate of 5*l.* per cent. per annum, on the 29th day of March then next, without deduction, unto them the said Robert Lowe, the plaintiff, and himself the defendant, or the survivors or survivor of them, upon the joint account aforesaid. Breach—non-payment.

No action will lie on a covenant by C. to pay a sum of money to A., B., and himself C., or the survivors or survivor of them on their joint account.

The defendant demurred, having set out on oyer the indenture, whereby, after reciting, "That Richard Lowe (the defendant), the said Robert Lowe, and Samuel Faulkner (the plaintiff) were possessed of, and interested in, divers monies on a joint account, and the said Richard Lowe had requested the said Robert Lowe and Samuel Faulkner to lend and advance thereout to him, the said Richard Lowe, the sum of 1600*l.*, which they had agreed to do; it was witnessed, that, in consideration of 1600*l.*, paid by Robert Lowe and Samuel Faulkner to Richard Lowe, or, with the permission of the said Robert Lowe

(a) Decided in the term preceding.

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and Samuel Faulkner, retained by the said Richard Lowe, to his own sole use, out of the monies belonging to them, the said Robert Lowe Samuel Faulkner, and Richard Lowe, upon a joint account as aforesaid," Richard Lowe conveyed to Robert Lowe and Samuel Faulkner certain premises in fee, subject to the following proviso, which was the covenant declared on:—"Provided always, that, if the said Richard Lowe, his heirs, executors, &c., shall pay, or cause to be paid, unto them, the said Robert Lowe and Samuel Faulkner, *and himself the said Richard Lowe*, and the survivors or survivor of them, their or his executors, &c., upon the joint account aforesaid, the sum of 1600*l*, with interest for the same at the rate of 5*l* per cent. per annum, on the 29th day of March next, without deduction, then, immediately after such payment," the said premises shall be reassured, &c. Joinder in demurrer.

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T. Jones, in support of the demurrer.—No action will lie on this covenant, which is, in effect, a contract by the defendant to pay the money to himself. It makes no difference that the covenant is in terms with the plaintiff to pay the money to him and the defendant; for both being jointly interested in the sum a payment to the defendant himself would be a performance of the covenant. That, however, is impossible. Pothier, in his *Traité des Obligations*(*a*), points out the distinction between a thing possible in itself, and a thing absolutely impossible; in the former case, he says, the obligation subsists, notwithstanding it is beyond the means of the person obliged to accomplish it, and he is answerable for the damage occasioned by the non-performance of his engagement; but, in the latter case, the party is discharged from his obligation, because no man can be obliged to perform an impossibility. It is difficult to see what damages could be assessed against

(*a*) Page 1, ch. 1, sect. 4, s. 2, 132.

the defendant for non-payment to himself. Besides, the defendant, being jointly interested in this money, and being a party to the deed, ought to have been a co-plaintiff on the record.

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Martin, contra.—The performance of the covenant is not impossible. [*Pollock*, C. B.—If the covenant had been to place the money in the funds in certain names, one of which was the defendant, there would have been no difficulty; but this is a covenant by the defendant to pay himself. Suppose the defendant had pleaded that he had paid the money to himself, and then held it on the joint account?] The meaning of the covenant is, that the parties shall be placed in statu quo. [*Rolfe*, B.—If both covenantees had died before the 29th of March, then, the defendant being the survivor, the money would have been payable to him alone.] In that case, there might be difficulty in performing the covenant; but, one of the covenantees being alive, the question does not arise. In *Rose v. Poulton* (a), there was a covenant by D., E., and C., and each and every of them, with A., B. and his wife, and C., to pay an annuity; and it was held, that, at least, after C.'s death, A. and B. might sue on the covenant, although it was entered into both by and to C. [*Alderson*, B.—This is not a covenant to pay A., B., or C., but to pay A., B., and C., on their joint account. *Pollock*, C. B.—The covenant, to my mind, is senseless. I do not know what is meant, in point of law, by a man paying himself.]

PER CURIAM (b).—There must be judgment for the defendant.

(a) 2 B. & A. 822.

(b) *Pollock*, C. B., *Alderson*, B., *Rolfe*, B., and *Platt*, B.

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NESS *v.* FENWICK.

A declaration in scire facias stated, that the plaintiff recovered against G., one of the public officers for the time being of certain persons united in co-partnership for the purpose of carrying on the trade and business of bankers in England, of which co-partnership G. was then a member, residing in England, and had been duly nominated, and before and at the commencement of the suit, had been, and at the time of the judgment was, one of the public officers of the company, a certain debt and costs, whereof G., as such public officer as aforesaid, is convicted, as by inspecting the rolls appears, &c.:—*Held*, on special demurrer, that the declaration was bad for omitting to state that the debt recovered against G.

was due and owing from the company to the plaintiff.

SCIRE FACIAS.—The declaration stated, that, whereas John Ness, lately, that is to say, on the 11th of August, 1847, in our Court, before the Barons of our Exchequer at Westminster, by the judge of the same Court, recovered against George Burdis, one of the public officers for the time being of certain persons united in copartnership by the name and description of the North of England Joint-stock Banking Company, for the purpose of carrying on the trade and business of bankers in England, under and by virtue and according to the form and effect of a certain act of Parliament, made and passed in the 7th year of the reign of his late Majesty King George IV, for the better regulating copartnerships of certain bankers in England, and which said George Burdis then was one of the members, residing in England, of the said co-partnership, and had been duly nominated and appointed, and before and at the time of the commencement of that suit had been, and at the time of the giving the said judgment still was, one of the public officers of the said company, pursuant and according to the force, form, and effect of the said act of Parliament, as well a certain debt of 3000*l.*, which, in our same Court, was adjudged to the said J. Ness, as also 23*l.* 6*s.* 6*d.*, which, in our same Court, were awarded to the said J. Ness for his damages which he had sustained, as well on occasion of the detaining the said debt as for his costs and charges by him about his suit in that behalf expended, whereof the said G. Burdis, as such public officer as aforesaid, is convicted, as by inspecting the rolls of our said Exchequer appears to us. And whereas, by and according to the provisions, form, and effect of the said statute, execution upon any judgment in any action obtained against any

public officer for the time being of any such copartnership, carrying on the business of bankers as aforesaid, under the provisions of the said act of Parliament, whether as plaintiff or defendant, may be issued against any member or members for the time being of such copartnership; and whereas, on behalf of the said J. Ness, in our same Court, we are informed, that, although judgment has been so as aforesaid given, yet execution of the debt and damages aforesaid still remains to be made; and on behalf of the said J. Ness, in our same Court, we are further informed, that C. S. Fenwick now is a member of the said copartnership, called the North of England Joint-stock Banking Company; wherefore the said J. Ness hath humbly besought us to provide him a proper remedy in this behalf; and we being willing that what is just in this behalf should be done, command you, that, by honest and lawful men of your bailiwick, you make known to the said C. S. Fenwick, that he be before the Barons of our said Exchequer at Westminster, on the 28th day of January now instant, to shew if he hath or knoweth of anything to say for himself, why the said J. Ness ought not to have execution against him, the said C. S. Fenwick, for the debt and damages aforesaid, together with interest upon the said two several sums of 3000*l.* and 23*l.* 6*s.* 6*d.*, at the rate of 4*l.* per cent. per annum, from the said 11th day of August, 1847, on which day the judgment aforesaid was entered up as aforesaid, according to the force, form, and effect of the said recovery and of the said statute, if it shall seem expedient for him so to do. And in what manner you shall execute this our writ, make appear to the said Barons at Westminster, on the said 28th day of January; and have you there the names of those by whom you shall so make known to him and this writ. Witness—Sir F. Pollock, Knight, at Westminster, 21st of January, 1848, and in the eleventh year of our reign. On which day comes here the said J. Ness, by J. S., his attorney; and the sheriff, to wit,

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J. H. H. A., Esq., sheriff &c. aforesaid now here returns, that, by D. M. and S. M., good and lawful men of his bailiwick, he has given notice to the said C. S. Fenwick to appear before the said Barons of her Majesty's Exchequer, at the day and place in the said writ mentioned, to shew cause, as by the said writ he is required, and as by the said writ the said sheriff is commanded; and the said C. S. Fenwick being solemnly demanded, comes by T. B., his attorney, and thereupon the said J. Ness, by his attorney aforesaid, prays that execution may be adjudged to him against the said C. S. Fenwick, of the debt, damages, and interest aforesaid, according to the force, form, and effect of the said recovery.

Special demurrer, assigning for causes that it does not sufficiently appear that the debt in the said action, recovered against the said G. Burdis, was due from the said copartnership; and that it does not appear with sufficient certainty that he was sued in the action as such public officer, or that he was such public officer when the action was commenced against him; or that the said copartnership ever actually carried on the trade or business of bankers in England, or any trade; and that the plaintiff is not stated to have become their creditor when they so carried on their business; and that the defendant cannot be considered as a member for the time being of the copartnership, by reason of being alleged to have been so at the time of issuing the said writ of scire facias, unless he were so at the time of the commencement of the suit against G. Burdis, which the declaration does not shew him to have been. Joinder in demurrer.

G. H. Cooper, in support of the demurrer.—This declaration is bad on the several grounds to which the special demurrer is directed. The plaintiff's remedy is given by the stat. 7 Geo. 4, c. 46. The 9th section gives the creditor the right to sue the copartnership in the name of the

public officer; and the 13th section gives the right to issue execution, upon a judgment so obtained against the public officer, against any member of the copartnership. This right is a statutable one, and did not exist at common law. The requisites of the statute must, therefore, be strictly observed. In the first place, the declaration does not allege that the debt recovered against Burdis was due from the copartnership. It is consistent with all the allegations in the declaration, that the debt was due from Burdis, and not from the Company, as the declaration does not even state that he was the public officer of the copartnership at the time the original action was commenced. The 9th section of the statute enacts, that all actions, against any person or persons who may be at any time indebted to any such copartnership, carrying on business under the provisions of the act, to be commenced or instituted for or on behalf of any such copartnership, against any person or persons, &c. for recovering any debts, &c. due to such copartnership, shall and lawfully may be commenced or instituted and prosecuted in the name of any one of the public officers, nominated as aforesaid, for the time being, of such copartnership, as the nominal plaintiff for or on behalf of such copartnership. The section then proceeds to enact, that all actions or suits, and proceedings at law or in equity, to be commenced or instituted by any person, &c. against such copartnership, shall and lawfully may be commenced, instituted, and prosecuted against any one or more of the public officers, nominated as aforesaid, for the time being, of such copartnership, as the nominal defendant for and on behalf of such copartnership. The plaintiff does not bring himself within the provisions of this section. The declaration is also bad for not stating that the copartnership actually carried on business. In the case of *Fletcher v. Crosbie* (a), the same objection was raised to a declara-

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(a) 9 M. & W. 252.

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tion which omitted the same allegation, and the Court held the objection good. *Parke*, B., there said, "The declaration is bad on special demurrer. It ought to have stated that the copartnership were *carrying on business*."

Watson, in support of the declaration.—The declaration is sufficient. This is a proceeding *against* a public officer, and not *by* one. It sufficiently appears that the debt upon which the judgment was recovered against Burdis was a debt due by the copartnership of which he was the public officer. The declaration with respect to the debt states, "whereof the said George Burdis, *as such public officer as aforesaid*, is convicted." The judgment was a judgment against him as a public officer of the copartnership. The judgment could not have been recovered against him in this form, had he not been a public officer and the debt a debt due by the copartnership then carrying on business. By the 12th section of the act in question, the judgments recovered against the public officers are to operate against the copartnership; and by the 13th section, upon such a judgment execution may be issued against any member of the copartnership. In a *scire facias*, the defendant can plead nothing in bar which he might have pleaded to the original action: *Cook v. Jones* (a). The judgment, therefore, establishes those matters, for the omission of which the defendant contends the declaration to be bad, namely, that Burdis was a public officer of the copartnership, that the debt was due by them, and that they carried on business. These matters, if alleged, could not now be traversed. The defendant could not traverse that Burdis was a public officer: *Bradley v. Eyre* (b). In that case, *Parke*, B., said, "The defendants have pleaded four pleas, which have been demurred to. The first is, that Brettell was not secretary *modo et formâ*. That may be disposed of by stating that it is a plea con-

(a) Cowp. 728.

(b) 11 M. & W. 432.

cluding to the country, professing to traverse an allegation which is not to be found in the declaration. Mr. *Cowling* objected to the declaration as bad, because it contains no averment that the proceedings were had against a person who was secretary to the Company at the time of suing out the writ in the original action. We think there is no foundation for that objection. The declaration states a judgment, which is averred to have been obtained against Brettell, as the secretary of the Company, for a debt due from the Company. It is true that it does not appear on the face of the declaration that Brettell was secretary at the time of the commencement of the suit; but we have no right to assume that the proceedings are erroneous or objectionable. Unless the proceedings are against a person who was secretary at the time of the commencement of the suit, the judgment is erroneous and irregular. We cannot presume that Brettell was not secretary at the time of the commencement of the suit; and, therefore, that objection cannot prevail." His Lordship, in a subsequent part of his judgment, says, "The rule of law is well settled, that you cannot plead to a scire facias any matter which might have been set up as a defence to the original action." Lord *Denman*, C. J., in *Philipson v. Lord Egremont* (a), says, "Fraud, no doubt, vitiates everything; and the Court, upon being satisfied of such fraud, has a power to vacate, and would vacate, its own judgment, as is suggested in *Bradley v. Eyre*." The present judgment is good, and binding until it be reversed. The defendant, therefore, cannot take these objections by special demurrer. In Comyn's Dig., tit. "Error" (D.), it is laid down, that "in a scire facias by an executor upon a judgment in ejectment by his testator against B., execution shall not be avoided nor judgment stayed by saying that the tenant died pendente lite; for he ought to avoid it

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(a) 6 Q. B. 605.

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by error. [*Parke, B.*—The difficulty is, whether the declaration sufficiently avers that the debt was due from the copartnership. Suppose the action against Burdis in his own personal character, and the judgment, were to go on to say, “as public officer,” would not the latter words be mere surplusage?] It is submitted that it would in that case be erroneous, and the judgment might be set aside. On a plea of nul tiel record, the plaintiff would be bound to produce a judgment in accordance with the allegation that the judgment was recovered against Burdis as public officer. With respect to the allegation that Burdis was one of the public officers for the time being, of certain persons united in copartnership for the purpose of carrying on business, &c., by virtue of the provisions of the act, the case of *Davidson v. Bower(a)* is an authority which shews that it is to be presumed that they actually carried on business.

PARKE, B.—I am of opinion that the defendant is entitled to our judgment, on the short ground that it is not distinctly averred, upon the face of the declaration, that the debt upon which the judgment was recovered in the original action was a debt due from the Company. The declaration, in all the cases to which reference has been made, contains a statement that the debt was due and owing from the Company. In the case of *Fowler v. Rickerby(b)*, the form contains these words:—“Whereas Sarah Fowler and J. Gaunt recovered against W. M. &c., which said W. M. had been duly nominated, and appointed, and registered as such public officer, and was then sued for and on behalf of the said Company, according to the form and effect of the said act of Parliament, 580*l.* &c., for their damages, which they had sustained, *as well on occasion of the not performing certain promises, then lately made by the said*

(a) 2 Dowl. N. S. 115; *S. C.*,
 5 Scott N. R. 538.

(b) 9 Dowl. P. C. 682; *S. C.*,
 3 Scott N. R. 138.

Company to the said Sarah Fowler &c.;" and Mr. Chitty, in his Precedents, has the same allegation. In order to warrant this writ of scire facias against a member, judgment ought to have been recovered against the public officer for a debt due from the Company. It is consistent with every allegation in this declaration, that this was not the debt of the Company, but that the judgment recovered against Burdis was one for which he was personally liable. I think that the words, "as public officer," are mere surplusage. Perhaps the allegation might be sufficient on general demurrer; but, as the objection is specially pointed out, I think that it must prevail, although it is to be regretted that it should.

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ALDERSON, B.—I am of the same opinion. In order to make the defendant liable, it must be shewn that the debt was a debt of the Company. It does not appear on the face of this declaration, that this was their debt. It is consistent with every allegation which it contains, that it was not.

ROLFE, B., concurred.

PLATT, B.—I think that the defendant is clearly entitled to our judgment. The plaintiff has omitted to state that the debt was due and owing from the Company. This remedy is given by statute, and all the requisites should be strictly observed.

Judgment for the defendant.

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To an action of debt on the common counts, the defendant pleaded, except as to 30*l.*, never indebted; and as to 30*l.* and the causes and cause of action in that respect, payment into court of 30*l.* and 6*d.*, and that the defendant never was indebted to plaintiff in a greater amount than 30*l.* in respect of the causes of action in the introductory part of the plea mentioned; and that plaintiff had not sustained damages by reason of the non-payment thereof to a greater amount than 6*d.* Replication, that the defendant was indebted to plaintiff in a greater amount than the said sum, in respect of the causes of action in the declaration mentioned.

Issue thereon:—*Held*, on motion for a new trial, that, whether the

issue was immaterial, or whether it raised the same issue as that raised by the first plea, in either case, it did not vitiate the proceedings, and was no ground for a new trial.

HUNT v. COX.

THE declaration contained three common counts. Pleas, except as to 30*l.*, parcel &c. (inter alia), never indebted. Fourth, "As to the sum of 30*l.*, parcel &c., in the above pleas excepted, and the causes and cause of action in that respect," payment into court of 30*l.*, and the further sum of 6*d.* The plea concluded thus:—And the defendant further saith, that he never was indebted to the plaintiff in a greater amount than the said sum of 30*l.* in respect of the causes of action in the introductory part of this plea mentioned, and that the plaintiff never hath sustained damage beyond the amount of the said sum of 6*d.*, in respect or by reason of the non-payment of the said sum, parcel, &c.

The plaintiff took issue upon the first plea; and to the fourth plea he replied, that the defendant was indebted to him in a greater amount than the said sum of 30*l.* and 6*d.*, in respect of the causes of action "*in the declaration mentioned*;" and upon this replication issue was joined. At the trial, before *Parke*, B., at the Middlesex Sitting in Trinity Term last, the plaintiff had a verdict for more than 30*l.*

Watson now moved for a rule calling on the plaintiff to shew cause why there should not be a new trial, and contended, that the traverse taken by the replication was immaterial, and that no issue in fact was raised by it.

Cur. adv. vult.

ALDERSON, B., now said:—This was an application for a rule to shew cause why there should not be a new trial;

and we are of opinion that there ought to be no rule. The objection arises out of the replication to the fourth plea. The defendant in that plea pleads as to the sum of 30*l.*, parcel &c. in the foregoing pleas excepted, and the causes and cause of action in that respect, payment into court of 30*l.*, and the further sum of 6*d.*; and the plea concludes by alleging that the defendant never was indebted to the plaintiff in a greater amount than the said sum of 30*l.* in respect of the causes of action in the introductory part of the plea mentioned, and that the plaintiff never hath sustained damage beyond the amount of the said sum of 6*d.* in respect or by reason of the non-payment of the said sum, parcel &c. To this plea the plaintiff replied, that the defendant was indebted to him in a greater amount than the said sum of 30*l.* and 6*d.* in respect of the causes of action in the declaration mentioned; upon which replication the defendant joined issue. On the trial, it appeared that the plaintiff was entitled to more than 30*l.* This issue is possibly wholly immaterial; for, as the plea is only to 30*l.*, and not to the whole demand, it is manifestly impossible that there can be damages *ultra*. But we think, that, if it be immaterial, it does not vitiate the proceedings; and if not immaterial, it is, in truth, the same as the issue on the first plea, never indebted, except as to 30*l.* In either view of the case there must be no rule.

Rule refused.

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MAILE v. MANN.

Where a bailiff is employed by an attorney to issue execution against a defendant, the attorney, and not the client, is liable to the bailiff for his fees.

ASSUMPSIT by the plaintiff, as bailiff of the sheriff of Cambridgeshire, for work and labour in executing a writ, and keeping a certain person arrested by the plaintiff at the request of the defendant, under the said writ. Plea, non assumpsit; upon which issue was joined. At the trial, before *Platt, B.*, at the Westminster Sittings, in Michaelmas Term last, it appeared that the present action was brought to recover the sum of 3*l.* 3*s.* for arresting and conveying to Cambridge gaol a person named Payne, against whom the defendant had obtained a judgment. The defendant had instructed his attorney, a Mr. Wilkin, to proceed against Payne for the recovery of a claim due by him on a promissory note. The action was brought against Payne in the name of Mr. Wilkin's town agent, and judgment therein was obtained against him. Under the instructions of the defendant, Wilkin ordered his agent to issue a ca. sa. against Payne. The London agent accordingly sued out execution, and sent the writ to the under-sheriff, with instructions that it should be delivered to the plaintiff, the sheriff's bailiff. It was contended, that, under these circumstances the plaintiff ought to be nonsuited, on the ground that the action was improperly brought against the client, and that it ought to have been against the attorney. Under his Lordship's direction the plaintiff had a verdict, leave being reserved to the defendant to move to enter a nonsuit.

O'Malley having obtained a rule accordingly,

Huddleston shewed cause in Trinity Term last (May 30). —The present action was rightly brought against the client, and he is liable to the plaintiff. The question

really is, with whom was the contract made? In *Robins v. Bridge*(a) it was held, that the attorney in a cause is not personally liable to a witness whom he subpœnaes to give evidence in a cause, for his expenses of attendance. The action, therefore, was not maintainable against the attorney, who acts merely as an agent, with a disclosed principal. So, in *Maybery v. Mansfield*(b) it was held, that the attorney of the execution plaintiff is not liable to the sheriff for the fees due on the execution of a writ of ca. sa. Erle, J., there says, "The law is, that the client is liable in such a case as this." In *Hartop v. Jukes*(c) it was held, that the solicitor under a commission of bankruptcy is not liable, in the first instance, to the messenger whom he nominates, for his bill of fees. In *Newton v. Chambers*(d) the Court of Queen's Bench held, that a sheriff's officer may maintain an action against the attorney of the plaintiff in the original suit, for caption fees, and conduct money, on proof of an employment by the attorney; and that it is the usual course of business for the attorney to be charged with, and to pay such fees. [*Pollock*, C.B.—In *Maybery v. Mansfield*, the case of *Robins v. Bridge* was not cited.] It was cited in *Seal v. Hudson*(e), and there Coleridge, J., seemed to think that the officer could not bring his action against the attorney. [*Alderson*, B.—The cases of *Foster v. Blakelock*(f), and *Walbank v. Quarterman*(g), are against you.] Those cases are distinguishable from the present, for there the attorney decidedly employed the plaintiff. [*Alderson*, B.—The question is, whether the attorney has any authority to pledge his client's credit in a matter where it is the custom for the attorney to pay the fees out of his pocket, where, in fact, it is a ready money transaction. If the bailiff chooses to give credit, he

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(a) 3 M. & W. 114.

(b) 16 L. J., Q. B., 102.

(c) 2 M. & Sel. 438.

(d) 1 Dowl. & L. 869.

(e) 4 Dowl. & L. 760.

(f) 5 B. & C. 328.

(g) 3 C. B. 94.

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must look to the party to whom he really gave credit.] He also cited *Hart v. White* (a).

The Court said they would call on the defendant's counsel, if necessary.

Couch, contra, was not called on.

Cur. adv. vult.

ROLFE, B., now said:—In this case, which was argued before us on the 30th of May last, we are of opinion that the rule to enter a nonsuit must be absolute. The action is brought by the plaintiff, a bailiff of the sheriff of Cambridgeshire, against the defendant, to recover the sum of 3*l.* 3*s.* for the plaintiff's trouble in executing a writ of *ca. sa.* issued against a third party, at the suit of the defendant and at his request. The defendant pleaded non-assumpsit. It was objected, at the trial, that the defendant was not liable, but that the defendant's attorney was the party who ought to have been sued; and upon this ground a rule was obtained to enter a nonsuit. The case was argued before us by Mr. *Huddleston*, on the part of the plaintiff, Mr. *Couch* appearing for the defendant, and the Court took time to consider their judgment. The case of *Foster v. Blakelock* decides that a sheriff's officer, who has been employed by an attorney to execute writs for him, may maintain an action against the attorney for the fees usually paid on such occasions. In *Walbank v. Quarterman* it was decided, that an attorney who employs a sheriff's bailiff is liable to him for his fees, and that the client is not liable, there being no privity between him and the officer. These cases are expressly in point. The plaintiff, on the other hand, relied on the case of *Maybery v. Mansfield*. That decision, however, is not at variance with *Walbank*

(a) Holt, N. P. 376.

v. *Quarterman*; for, in the former case, the action was by the *sheriff*, whose right of action depends upon statute and not upon contract. The plaintiff also relied on *Seal v. Hudson*, in the Bail Court, where my Brother *Coleridge* appears to have held, that the sheriff's officer could not sue the attorney except under very special circumstances. It does not, however, appear that the learned judge's attention was called to all the cases on the subject. If, however, *Seal v. Hudson* is to be considered at variance with *Foster v. Blakelock* and *Walbank v. Quarterman*, and this Court is compelled to choose between conflicting authorities, we prefer adhering to the two latter decisions. The rule must therefore be absolute to enter a nonsuit.

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Rule absolute.

HASTINGS and Others, Executors of KENRICK WATSON,
v. WHITLEY.

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DEBT on a bond for 2000*l.*, made by the defendant in the lifetime of the testator.

The defendant craved oyer of the bond and condition, and set them out in *hæc verba*. The condition was as follows: "Whereas the said Kenrick Watson hath for many years past exercised and practised the profession or business of a surgeon and apothecary, at Stourport aforesaid; and whereas it hath been agreed between the said K. Watson and P. Whitley, that the said P. Whitley shall become the assistant of the said K. Watson, in the exercise and practice of the said profession or business of a surgeon and apothecary, at the annual salary of 30*l.*; and upon treating

To debt on bond, by the executors of the obligee, the defendant, after setting out on oyer the condition, which was, that "if the obligor should practise as a surgeon or apothecary at S., at any time, without the consent in writing of the obligee, then, if the obligor should pay the obligee

1000*l.*, the bond should be void, otherwise it should remain in force," pleaded, that he did not practise as a surgeon or apothecary at S. without the consent in writing of the obligee:—*Held* bad, on general demurrer, for not shewing the performance of the condition which rendered the bond void—*Held*, also, that the period of restraint, mentioned in the condition, was not confined to the lifetime of the obligee.

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HASTINGS
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for the said agreement, it was further stipulated, that the said P. Whitley should enter into the bond or obligation hereinbefore written or contained: now, the condition of the above written bond or obligation is such, that if the above P. Whitley shall, either as principal or assistant, or either alone or in copartnership with any person or persons whomsoever, exercise or practise, or assist in exercising or practising the said profession or business of a surgeon or apothecary, or either of them, either at Stourport aforesaid, or within the distance of ten miles in any direction of Stourport aforesaid, *at any time* after the termination of his said present engagement with the said K. Watson, without the consent in writing of the said K. Watson first had and obtained, then and in such case, if the said P. Whitley, his heirs, executors, or administrators, shall and do forthwith pay or cause to be paid to the said K. Watson, his executors, administrators, or assigns, the full sum of 1000*l.* of lawful money, &c., then the said bond or obligation shall be void and of no effect, otherwise it shall remain in full force and virtue." The defendant pleaded, secondly, that he did not, either as principal or assistant, or either alone or in copartnership with any person or persons whomsoever, exercise or practise, or assist in exercising or practising the said profession or business of a surgeon or apothecary, or either of them, either at Stourport aforesaid, or within the distance of ten miles in any direction of Stourport aforesaid, at any time after the termination of his said engagement with the said K. Watson, without the consent in writing of the said K. Watson for that purpose first had and obtained. Verification.

Replication, that, after the execution of the writing obligatory, to wit, on &c., the said engagement with K. Watson terminated; and that afterwards, and before the commencement of the suit, to wit, on &c., the defendant did, without the consent in writing of the said K. Watson for that purpose first had and obtained, as principal, and

alone, practise the said profession, &c. of a surgeon and apothecary, at Stourport aforesaid; and further, that the defendant did not pay to the said K. Watson in his lifetime, nor to the plaintiffs as executors, &c., or to any person whomsoever, the said sum of 1000*l.* &c. Verification.

Rejoinder, that the defendant did not, *in the lifetime* of the said K. Watson, either as principal or assistant, or either alone or in copartnership with any person or persons whomsoever, exercise or practise, &c. the said profession, &c. of a surgeon or apothecary, at Stourport aforesaid, or within the distance of ten miles in any direction of Stourport aforesaid, at any time after the termination of his said engagement with the said K. Watson, without the consent in writing of the said K. Watson first had and obtained for that purpose; and that the said exercising, &c. the said profession, &c. at &c. in the said replication mentioned, took place after the death of the said K. Watson, &c. Verification.

Special demurrer, assigning for cause, that the rejoinder is a departure from the plea. Joinder in demurrer.

The plaintiff's point for argument was, that the defendant's plea is bad, as it does not shew a performance of the condition of the bond, by shewing that the defendant did not practise in the lifetime of K. Watson. One of the defendant's points for argument was, that the bond is illegal and void, if the condition should be construed to extend to the defendant's practising the said profession after the death of the testator.

Gray, in support of the demurrer.—The rejoinder is clearly bad, as being a departure from the plea.

The plea is bad in substance. Upon the true construction of the condition of the bond, the restraint which the defendant has imposed upon himself is not to be confined to the period of Watson's lifetime. The words of the condition

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are, "*at any time.*" They do not limit the period. [*Alderson, B.*—It does not even follow that the defendant would have the power, during the lifetime of Watson, to obtain his consent, for Watson might have become insane.] It may be urged as a hardship, that he is unable to get Watson's consent; but, no doubt, Watson was desirous that the good-will of his practice should go, after his death, to his representatives, who might derive some benefit from it. The language of the condition is clear and reasonable. If the intention of the parties had been to limit the condition to any definite period, it would have been an easy thing to have expressed it in such terms. [*Parke, B.*—The agreement may be good and binding, and there is no objection to it on the ground of the restriction being indefinite as to duration, if the restriction is in other respects reasonable. There are several cases which go to establish the proposition.]—In the second place, the bond still remains in full force, unless the defendant shews that he has performed the condition by which it is rendered void. He ought clearly to shew that the condition has been performed. Now, the condition is not, that, if the defendant does not practise, the bond shall be void, but it is, that he must practise without Watson's consent, and pay 1000*l.* to save the penalty of the bond. The plea does not shew that the whole of the condition which is to render the bond void has been performed; it is, therefore, bad in substance, and consequently is so on general demurrer.

Hugh Hill, contra.—It is desirable that the defendant should have the opinion of the Court as to the true and proper construction of the condition of the bond. It is submitted, that the defendant was restrained from practising within the prescribed limits, only during the lifetime of Watson. The inartificial way in which the instrument is framed is an argument for this limited construc-

tion. To use the words of *Holroyd, J.*, in *Sicklemore v. Thistleton* (a), "The intent and not the form is what we are to look at." In *Hitchcock v. Coker* (b), it was held by the Court of Exchequer Chamber, that the restriction was good, although it continued for the life of the party restrained. That is distinguishable from the present, for that was a trade which had been disposed of. [*Parke, B.*—What is the difference? The good-will of an apothecary is often disposed of.] This is a matter in which professional skill is concerned.

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PARKE, B.—I am clearly of opinion that the plea is bad, as it does not shew that the condition has been performed by which the bond is to be rendered void and of no effect. The plaintiffs are therefore entitled to judgment. We are requested by Mr. *Hill* to give our opinion as to the true construction of the condition. Now, the words, "for any time," *primâ facie* import that the period is not to be confined to the life of the obligee, but that it is co-extensive with that of the obligor; and it was held, in *Hitchcock v. Coker*, that there was nothing illegal in the restriction being indefinite as to duration, the same being in other respects a reasonable restriction. This question was much considered, and the principle upon which it is founded was explained, in the case of *Mallan v. May* (c). Now, as this is *primâ facie* a restriction which is not limited as to time, what is there in the terms of the condition to confine it to the period of the testator's lifetime? The only terms which can allow any other construction to be put upon it, are the words "without the consent in writing of the said K. Watson;" and I do not think that these words shorten the period. The defendant would be bound to get Watson's consent if he practised. If he practised without his consent, and without paying the 1000*l.*, he would be

(a) 6 M. & Sel. 9. (b) 6 Ad. & E. 438. (c) 11 M. & W. 653.

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liable to the penalty of the bond. I think, therefore, that, by putting the ordinary construction on the words of this condition, the defendant has failed to shew he has performed it so as to relieve himself from the penalty of the bond.

ALDERSON, B.—I am of the same opinion. *Mr. Hill*, by the construction he wishes that we should put upon the condition of the bond, gives no effect to the words “at any time.”

ROLFE, B.—I am of the same opinion. There is no inconsistency in saying, that there might have been no period during *Watson's* lifetime during which the defendant could have obtained his consent, for, as my Brother *Alderson* observed, he might have become insane.

Judgment for the plaintiffs.

July 11.

RICHARDS v. LORD SUFFIELD.

The 26th section of the 6 & 7 Vict. c. 73, only disables an uncertificated attorney from suing for fees, rewards, or disbursements for any business, matter, or thing done by by him as an attorney or solicitor in some suit or proceeding in one of the Courts mentioned in the act, and not for business done which had no reference to such suits or proceedings.

ASSUMPSIT in 500*l.* for the work and labour, care, diligence, journies, and attendances of the plaintiff, by him done, performed, and bestowed, as the attorney and solicitor of and for the defendant, at his request; and for fees due and of right payable to the plaintiff in respect thereof; and for materials and necessary things by the plaintiff provided in and about the said work, &c.; and in 500*l.* for other work and labour done by the plaintiff for the defendant at his request; and in 500*l.* for money paid. Plea as to the first, second, and third counts, that the plaintiff, under and by virtue of the said first, second, and

act, and not for business done which had no reference to such suits or proceedings.

third counts, claims and seeks to recover against the defendant in this action certain fees, rewards, and disbursements, for and in respect of certain business, matters, and things theretofore done by the plaintiff as an attorney and solicitor, for him, the defendant; and that, at the time the said business, matters, and things were done by the plaintiff as aforesaid, to wit, on &c., he, the plaintiff, as such attorney and solicitor as aforesaid, did then carry on certain proceedings, to wit, conduct and manage a certain cause in which J. G. was plaintiff, and the now defendant defendant, in the Court of Exchequer at Westminster, without having previously obtained or then having a stamped certificate then in force, contrary to the form of the statute in such case made and provided; and that the said business, matters, and things, for the recovery of the fees, rewards, and disbursements in respect of which this action is brought, and each and every of them, were and was done by the plaintiff as such attorney and solicitor as aforesaid, whilst he was without such certificate as last aforesaid.

Verification.

Special demurrer, assigning for causes (amongst others), that it does not appear by the plea that the business, &c., done by the plaintiff as an attorney and solicitor, in respect of which the fees in the first, second, and third counts are alleged to be claimed, were done by the plaintiff in suing, prosecuting, defending, or carrying on any action or suit, or any proceeding in any of the courts mentioned in the statute: nor does it appear at what time of the year the work was done, which might have been between the 15th of November and the 16th of December; in which case the plaintiff might have obtained a certificate after the business was done, and before the 16th of December.

The case was argued in Easter Term last, (May 1st), by

S. Temple, in support of the demurrer.—The plea, which

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purports to be framed under the 26th section of 6 & 7 Vict. c. 73, is bad, chiefly on the ground that it does not state that the business for which the plaintiff now seeks to recover remuneration related to any action or suit, or other proceeding, in any court mentioned in the act. The 26th section enacts, "that no person, who as an attorney or solicitor shall sue, prosecute, defend, or carry on any action or suit, or any proceedings, in any of the courts aforesaid, without having previously obtained a stamped certificate, which shall be then in force, shall be capable of maintaining any action or suit at law or in equity, for the recovery of any fee, reward, or disbursement for or in respect of any business, matter, or thing done by him as an attorney or solicitor as aforesaid, whilst he shall have been without such certificate as last aforesaid." As this section is highly penal, it ought to be strictly construed. [He was then stopped by the Court, who called upon]—

Hurlstone, in support of the plea.—The plea is sufficient; it follows the precise terms of the section.—[*Platt*, B.—Do not the words "as an attorney or solicitor as aforesaid," in that section, refer to the work done by them in actions, &c.?] The defendant contends, that an attorney who is uncertificated is disqualified from suing for fees, for any work, &c., which he may have done, whether such work, &c., was done in one of the courts mentioned in the act or not. By the stat. 25 Geo. 3, c. 80, attornies and solicitors were required to take out certificates annually, and, in case they acted without one, they were subjected, by the 7th section of that act, to a penalty of 50*l.*; and the latter part of that section also enacts, that they shall be, and are hereby "made incapable to maintain or prosecute any action or suit in any court of law or equity, for the recovery of any fee, reward, or disbursements on account of prosecuting, carrying on, or defending any such action,

suit, or proceeding." It is to be observed, that the language in that section, and in the 30th section of the 37 Geo. 3, c. 90, is identical, but the Legislature, though treating of the same subject, in the 6 & 7 Vict. c. 73, s. 26, uses language wholly different. By the 31st section of the 37 Geo. 3, c. 90, if an attorney had not taken out his certificate for a year, his admission was void, and he was off the roll: *Wilton v. Chambers*(a); but this is now repealed by the 6 & 7 Vict. c. 73, s. 1. It is, therefore, submitted, that the Legislature, by having removed certain penalties to which attornies and solicitors were liable, and by using different language in the 26th section of the 6 & 7 Vict. c. 73, intended that the penalty, that an uncertificated attorney or solicitor should not be able to recover for any business done in that capacity, should be substituted for the penalty of being off the roll. The language of the 35th and 36th sections of the present act is more restricted than that of the 26th section. If, therefore, it had been the intention of the Legislature to have confined the penalty imposed by the 26th section to the business done in the courts mentioned in the act, the same language would have been used as was adopted in the older acts, and in the other sections of the present act. As to the construction of a statute, the words of *Coleridge, J.*, in *Rex v. St. Pancras*(b), appear very appropriate to the present matter:—"It is, in my opinion, so important for the Court, in construing modern statutes, to act upon the principle of giving full effect to their language, and of declining to mould that language, in order either to meet an alleged convenience, or an alleged equity, upon doubtful evidence of intention, that nothing will induce me to withdraw a case from the operation of a section which is within its words, but clear and unambiguous evidence that so to do is to fulfil the general intent of the statute; and also,

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(a) 7 Ad. & E. 524.

(b) 6 Ad. & E. 7.

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to adhere to the literal interpretation, is to decide inconsistently with other and overruling provisions of the same statute." [He also argued, in answer to the other objection, that, if the business was, in fact, done between the 15th of November and the 16th of December, the plaintiff should have replied that matter; and cited *Jones v. Axen* (a), *Washbourn v. Burrows* (b), *Thibault v. Gibson* (c).]

S. Temple, in reply.—The plea is insufficient, for the 26th section of the statute does not bear the construction for which the defendant contends. The plea is bad, for not shewing that the plaintiff was an attorney within the statute. A person may do work as attorney without acting as an attorney-at-law, as, for instance, in Parliament in passing a bill, or at an election. But the plea does not state that the business was done by the plaintiff in the capacity which is pointed out by the 2nd and 3rd sections; and the words "an attorney or solicitor *as aforesaid*," mean an attorney or solicitor within the meaning of the preceding clauses of the act.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKER, B.—(After stating the pleadings, and the demurrer, his Lordship proceeded)—The principal objection to this plea, on the argument of the demurrer, was, that it does not appear by it that the action was brought for "fees, rewards and disbursements," within the meaning of the 26th sect. of the 6 & 7 Vict. c. 73, the plaintiff's counsel contending that this section disables an attorney, who is uncertificated, only from suing for fees, rewards, or disbursements for any business, matter, or thing done by him as an attorney or solicitor, in some suit or proceeding in one of the courts mentioned in the act, and not for business done

(a) 1 Ld. Raym. 119. (b) 1 Exch. 107. (c) 12 M. & W. 88.

which had no reference to such suits or proceedings; and we are of that opinion.

The 26th section provides, "that no person, who as an attorney or solicitor shall sue, prosecute, defend, or carry on any action or suit, or any proceedings, in any of the courts aforesaid, without having previously obtained a stamped certificate, which shall be then in force, shall be capable of maintaining any action or suit at law or in equity for the recovery of any fee, reward, or disbursement, for or in respect of any business, matter, or thing done by him *as an attorney or solicitor as aforesaid*, whilst he shall have been without such certificate as last aforesaid."

The question is, what meaning we are to attribute to the words of reference in the expression, "*as an attorney or solicitor as aforesaid*." We think they must *necessarily* refer either to an attorney or solicitor acting as described in the commencement of that section, or to the previous description of an attorney and solicitor in the 2nd section; and in the former case the disability will be confined to suits for fees, &c. due for business done as an attorney, in suing, prosecuting, defending, or carrying on any action or suit, or any proceedings in any of the courts aforesaid; in the latter, for fees due to an attorney, &c., acting as such, in suing out any writ or process, or commencing, carrying on, soliciting or defending any action, suit, or other proceeding in the name of any other person, or in his own name, in any of the courts mentioned in the 2nd section, including proceedings before one or more justices; so that it really makes no difference whether the words "*as aforesaid*" relate either to the beginning of the 26th section or to the 2nd. To one or the other they certainly do refer; and, in either, the disability to sue is confined to fees, &c. connected with a suit.

It was, however, argued by Mr. *Hurlstone*, that the difference of the language of the Legislature, in the 35th and

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36th sections, from that in the 26th, indicated a different intention in the Legislature.

The 35th section provides, that, if any person not admitted and enrolled sues out any writ or process, or defends an action, he shall be incapable of maintaining an action for any fee, &c., on account of prosecuting, carrying on, or defending any such action, suit, or proceeding, or otherwise in relation thereto; and a similar provision is made if any person shall commence, or carry on, or defend an action in the county court. The language being more general in the 26th section, it was contended, that the restriction in that section was meant to be more extensive.

It appears to us, that the words of reference, "as an attorney or solicitor as aforesaid," confine the disability to the same class of fees, rewards and disbursements as those pointed out expressly in the 35th and 36th sections. This being so, the plea is, in our opinion, defective, in not averring that the fees, &c., were due to the plaintiff, as an attorney, in prosecuting or defending a suit or proceeding in a court; they are not even stated to be due to him as an *attorney-at-law*, and they might be payable to him as an attorney acting before arbitrators, or a compensation jury, or transacting business under a power of attorney for the defendant.

Judgment for the plaintiff.

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July 13.

MIDDLEDITCH v. ELLIS.

DEBT for money lent, and on an account stated.—The defendant pleaded, first, never indebted; secondly, that the defendant delivered a bond, conditioned for the payment by the defendant to the plaintiff, of the sum of 350*l.*, which the plaintiff then accepted in satisfaction and discharge of the debt in the declaration mentioned; and, thirdly, usury. The plaintiff replied by taking issue on the first plea, traversing the second, and replying *de injuriâ* to the last plea; and, upon these replications, issues were joined.

Where a sum of money is secured by a deed, and a balance is struck for the purpose of ascertaining how much remains due thereon, and the obligor admits the correctness of the account, and promises to pay it—Debt on simple contract, on an account stated, will not lie, but the action must be brought on the specialty.

At the trial, before *Platt*, B., at the Middlesex Sessions, in Michaelmas Term, 1847, it appeared that the plaintiff, in 1843, lent the defendant the sum of 350*l.*, which was secured by an assignment, by way of mortgage, of leasehold property, with a power of sale, and collaterally, by the defendant's bond given to the plaintiff. In 1847, the property was sold by the plaintiff, and the account of the sale, which the defendant admitted to be correct, shewed a deficiency of 128*l.* 12*s.* 10*d.*, and that the defendant promised to pay the balance; and the present action was brought to recover that sum. It was contended, by the defendant's counsel, that the present action of debt on simple contract would not lie, upon the authority of 1 Roll. Abr. "Action sur Case," p. 9, pl. 11, and *Petch v. Lyon* (a). Under the direction of the learned judge, the plaintiff had a verdict, leave being reserved to the defendant to move to enter a nonsuit.

Pashley, in Michaelmas Term last, moved accordingly.—The defendant is entitled to have a nonsuit entered. The defendant's promise was merely an admission of something being due on the specialty, which does not change the nature of the debt so as to entitle the plaintiff to maintain

(a) 9 Q. B. 147.

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this action upon the account stated. In *Drue v. Thorne*(a), *Mainard* said, arguendo, "The accompt doth not alter the nature of the debt, but only reduceth it to a certainty;" and the reporter adds, that "*Roll. agreed in all things with Mainard.*" [Parke, B.—In *Foster v. Allanson* (b), the plaintiff and defendant had been partners, and an action on an account stated was supported, although the partnership deed contained a covenant for adjusting the accounts; but there, some items, not connected with the partnership, were included in the same account for which the action was brought; and that circumstance is adverted to by *Buller, J.*, in his judgment, and seems to have been the precise ground on which Lord *Ellenborough* distinguishes the case of *Foster v. Allanson* from that of *Schack v. Anthony* (c).]

A rule nisi being granted,

Lush shewed cause in Trinity Term last (May 30).—The plaintiff was entitled to recover in the present form of action, notwithstanding the deed. The case of *Petch v. Lyon* (d), upon which the defendant relied at the trial, does not support the proposition for which he will contend. That case stands on the facts which were there proved, and the Court of Queen's Bench held, that there was no evidence to support a debt due by the defendant on an account stated. *Foster v. Allanson* (b) is a very similar case to the present. There the parties entered into articles of copartnership. At the end of the partnership the parties settled an account, and the Court there held, that an action on the account stated was proper. The plea is, that the defendant never was indebted on an account stated. There was an account stated, and the defendant admitted its correctness, and promised to pay it.

The Court called on

(a) Aleyn, 73.
 (b) 2 T. R. 479.

(c) 1 M. & Sel. 573.
 (d) 9 Q. B. 149.

Pashley, in support of the rule.—The action should have been brought on the deed. The debt is merged in the higher security. There is no new element created by the mere statement of the account: that transaction does not alter the nature of the debt. Lord *Ellenborough*, in *Schack v. Anthony* (a), remarks, that, in the case of *Foster v. Allanson*, “there were several things, unconnected with the deed, which were included in the action.” In the present case, any interest might have been recovered by an action on the specialty. In *Schack v. Anthony*, Lord *Ellenborough* says, that “if a bond were given to a trustee, it could hardly be contended that an action of assumpsit might be maintained by the cestui que trust for the recovery of the money secured by the bond.” The law is correctly stated in *Drue v. Thorne* (b), that “the accompt doth not alter the nature of the debt, but only reduceth it to certainty.” The same rule is to be found in Roll. Abr. “Action sur Case,” p. 9, pl. 11. In support of this rule the following cases may be cited: *Jones v. Ryder* (c), *Lubbock v. Tribe* (d), *Davis v. Gyde* (e), *Kearslake v. Morgan* (f), *Edwards v. Bates* (g); and if the action had been brought upon the specialty, the defendant could not have used the statement of account as a defence to the action: Com. Dig. “Pleader,” (2 W. 46).

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Lush was then heard against the rule.—The defendant does not deny that an account was stated. The same objection as the present was raised in *Moravia v. Levy* (h), in which case there was a covenant between the parties; but *Buller*, J. said, “It does not signify, in this case, how the debt arose. Here is an express promise to pay the balance which had been struck, and that is the ground of

(a) 1 M. & Sel. 575.

(b) Aleyn, 73.

(c) 4 M. & W. 32.

(d) 3 M. & W. 607.

(e) 2 Ad. & E. 623.

(f) 5 T. R. 513.

(g) 7 M. & G. 590.

(h) 2 T. R. 483, n.

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the action, otherwise the objection would have been good." So here also there is a promise to pay the balance. [He also referred to *Baber v. Harris* (a).]

Cur. adv. vult.

The judgment of the Court was now delivered by

ROLFE, B.—This case was tried before my Brother *Platt*, last Michaelmas Term, and a verdict was found for the plaintiff, subject to leave reserved to the defendant to move to enter a nonsuit, if the Court should be of opinion, that, under the circumstances of this case, an action of debt on an account stated would not lie.

A rule nisi for entering a nonsuit having been granted pursuant to this leave, the same was argued last term before the Chief Baron and my Brothers *Alderson*, *Platt*, and myself.

The plaintiff was mortgagee under a mortgage from the defendant, with a power of sale, and the mortgage deed contained the ordinary covenant by the defendant to pay the principal sum secured, with interest. The mortgaged property was afterwards sold by the plaintiff under the power, but it did not produce sufficient to discharge the debt due to the plaintiff. A meeting afterwards took place between the plaintiff and defendant, when an account was stated between them, charging the defendant with the full amount of principal and interest, and giving him credit for the net proceeds of the sale. It may be taken that the defendant admitted the balance of this account to be correctly ascertained, and that he promised to pay it. The verdict was for that balance; and the only question is, whether, on this state of facts, an action of debt on an account stated can be maintained; and we think it cannot.

The general principle is clear, that where a debt is

(a) 9 A. & E. 532.

secured by a bond, covenant, or other specialty, there the obligation by simple contract is gone. The lesser security is merged in the greater. But the plaintiff contended that that doctrine does not apply in the present case, for, though the original debt was secured by a covenant, yet, that, here there was a subsequent statement of accounts, so that the defendant on that occasion made himself liable by a new contract to pay the balance remaining due; and, in support of this proposition, he relied on the case of *Foster v. Allanson* (a). In that case the plaintiff and defendant had entered into articles of partnership, under seal, for seven years, and they covenanted with each other to adjust and make a final settlement at the end of the partnership, and then to divide the stock and profits equally between them. Before the expiration of the seven years, they agreed to dissolve the partnership, and they came to a settlement of accounts, in which were included several items not relating to the partnership. A balance was found to be due, on this settlement, to the plaintiff; and it was held, that, notwithstanding the specialty, the plaintiff might recover that balance in an action of assumpsit on an account stated; but the judgment of *Ashurst, J.*, goes expressly on the ground that this was a new transaction, and that the account was stated of other matters besides the items due under the deed; and, though *Buller, J.*, says, that, even if no other articles had been introduced, he should have been of opinion that assumpsit would lie, yet that opinion was founded on the circumstance, that the dissolution of the partnership, and subsequent settlement of account, constituted, in point of law, a good consideration for a new promise.

Now, in the present case, none of the circumstances relied on in *Foster v. Allanson* are to be found. The defendant is charged with nothing but the money se-

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(a) 2 T. R. 479.

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cured by the deed; there is no consideration for the suggested new liability, except the ascertaining how much remains due on the deed. It is a perversion of language to speak of this as an account stated: it is merely a process adopted for the purpose of ascertaining how much of the original debt has been discharged; and all which is really done is to make out to what extent the defendant remains liable upon the deed. This does not entitle the plaintiff to proceed as on a new liability arising from an account stated; and so the rule for a nonsuit must be made absolute.

Rule absolute.

June 23.

KING v. COLE.

In an action of assumpsit on a guarantie, the plaintiff, in support of an averment in the declaration, that he had executed a certain indenture, gave in evidence the following document, signed by the defendant: "In consideration of your having by indenture agreed to accept payment of the debt owing to you by A. B., by the following instalments: that is to say, 10s. in the pound, on the 18th day of August next, &c., I promise to guarantee the payment of the instalments." There was evidence, that, when A. B.'s creditors received the guarantie, they signed the deed at the same time:—*Held*, that, under the circumstances of the case, the true construction of the guarantie was, "that, if at some future time the plaintiff shall have released the debt, the defendant will guarantee the same to him;" and, therefore, that it did not prove the averment in the declaration.

ASSUMPSIT on a guarantie.—The declaration stated, that one Joseph Wilkinson was indebted to the plaintiff in a certain sum; and thereupon, in consideration that the plaintiff would agree to accept payment by instalments, of the said debt from the defendant, and would execute an indenture, purporting to be made by and between &c., (describing it,) and thereby release unto the said J. Wilkinson the said debt, the defendant promised to pay the debt by instalments. Averment, that the plaintiff did agree to accept payment of the debt by instalments, and did execute the said indenture, and did thereby release the said J. Wilkinson. Breach, nonpayment of the instalments.

The defendant pleaded non assumpsit, and a traverse that the plaintiff executed the said indenture modo et formâ; upon which pleas issue was joined. At the trial

of the cause, before *Rolfe*, B., at the last Spring Assizes at Liverpool, the present case was immediately preceded by one of *Hassall v. Cole*, in which the pleadings were the same. In support of the second issue, a deed was produced, but was rejected, as being improperly stamped; and the plaintiff then produced the following guarantie:—

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“Mr. John Hassall—In consideration of your having, by indenture bearing date the 18th day of February, 1847, agreed to accept payment of the debt owing to you by J. Wilkinson, of Birkenhead, amounting to the sum of 650*l.*, by the following instalments: that is to say, the sum of 325*l.*, part thereof, being at the rate 10*s.* in the pound, on the 18th day of August, 1847, and the sum of 325*l.*, the residue of the said debt, on the 18th of February, 1848, and of your having, by the same indenture, released the said J. Wilkinson from such debt, I do hereby guarantee to you the payment of such debt or sum of 650*l.*, at the times and in manner aforesaid. Dated this 18th of February, 1847.

“WILLIAM COLE.”

It was proved that Cole signed agreements in this form, addressed to each of Wilkinson's creditors, and delivered them to his attorney, who carried them, with the indenture, to his creditors, each of whom, when he executed the deed, received his signed guarantie from the attorney at the same time. It was contended, on the part of the plaintiff, that the guarantie was an admission by the defendant, that the plaintiff had released Wilkinson, and was original evidence of such release, though the indenture was not read. It was objected, for the defendant, that the guarantie was no admission of a past release, but rather of a future one; in which latter case there was a variance between the guarantie and the declaration, which was open under non assumpsit. It was also objected, that

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there was a variance, as the guarantie did not admit such a release as that stated in the declaration. The learned judge reserved leave to the defendant to move to enter a nonsuit, if the Court should be of opinion that the amendment ought not to have been made, reserving power to the plaintiff to amend the declaration, if the Court should think fit.

The present case of *King v. Cole* was then called on; and, it being agreed that the pleadings and facts in all respects were the same as those in *Hassall v. Cole*, a similar verdict was entered, with similar leave to move,—the same evidence to be evidence in both cases.

Knowles moved accordingly, and obtained a rule nisi for a nonsuit, or for a new trial, on the ground that there was no evidence to support the averment of the release; but, on the other grounds, the Court refused the rule.

Martin and Tomlinson shewed cause (June 22).—The only question is, whether there was evidence to support the averment in the declaration, that the plaintiff executed the release; and it is submitted that there was. The cases of *Slatterie v. Pooley* (a), and *Howard v. Smith* (b), are expressly in point. In the former of these, the rule was laid down, that a parol admission by a party to a suit is always receivable in evidence against him, although it relate to the contents of a deed or other written instrument, and even though its contents be directly in issue in the cause. In the latter case, *Tindal*, C. J., in delivering the judgment of the Court, concluded by saying, “We are of opinion that the statements made by the plaintiff himself, of the terms upon which he was actually holding the premises, were admissible against him, notwithstanding what had passed respecting the written agreement under which the

(a) 6 M. & W. 664.

(b) 3 M. & G. 254.

former tenant had held; and that the present case must be governed by the law, as laid down in *Slatterie v. Pooley*." If the deed had been destroyed, this instrument would have been secondary evidence for the jury; and, according to the preceding cases, it is original evidence of the deed.

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Knowles, contra.—The terms of the guarantie, "in consideration of your *having* by indenture," as taken with all the surrounding circumstances, will bear two significations—either that the plaintiff would execute a release, or that he had executed one. In the latter case, the declaration, which states an executory consideration, would not be supported. If the former construction be adopted, it is no evidence to prove the averment that the deed had been executed. In either view, the plaintiff must fail. Then the evidence is, that the guarantie was signed and delivered by the defendant to his attorney, to be handed over to the plaintiff, and at that time no deed had been executed. [*Alderson*, B.—It is to be taken as an admission at the time it is handed over to the party. The party who hands it over is the agent to make the admission. *Rolfe*, B.—It would have been no admission if it had been immediately destroyed, without being handed over.] It cannot be construed to be both past and future, for two different purposes. [*Rolfe*, B.—May it not be taken as contemporaneous, and then it could stand both ways?]

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B.—The question in this case is, whether there is any evidence of the averment in the declaration, that the plaintiff, by the indenture, dated &c., released the debt due to him from J. S. The admissions put in prove that the indenture described in the declaration was exe-

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cuted; but they go no further. They do not shew what the operation of that indenture was.

The only evidence of this suggested by the counsel for the plaintiff was the guarantie itself. That guarantie was as follows :—

“ Mr. John Hassell—In consideration of your having, by indenture bearing date the 18th day of February, 1847, agreed to accept payment of the debt owing to you by J. Wilkinson, of Birkenhead, amounting to the sum of 650*l.* by the following instalments: that is to say, the sum of 325*l.*, part thereof, being at the rate of 10*s.* in the pound, on the 18th day of August, 1847, and the sum of 325*l.*, the residue of the said debt, on the 18th of February, 1848, and of your having, by the same indenture, released the said J. Wilkinson from such debt, I do hereby guarantee to you the payment of such debt or sum of 650*l.* at the times and in manner aforesaid. Dated this 18th of February, 1847.

“ WILLIAM COLL ”

This guarantie was signed by the defendant at an antecedent period; but, being delivered to his attorney, to be handed over to the plaintiff, we think that it must be considered as an admission made by the defendant on the day on which it was so handed over, and is the same as if it had been written or spoken by the defendant at that time. And, if it be so, it is clear that an admission, either verbal or in writing, by him of the contents of a deed, would be sufficient proof as against him of those contents.

What, then, is the true construction of the guarantie?

If, by the words “having released,” we are to understand an admission by the defendant, that at some antecedent period the plaintiff had released, the guarantie will shew the truth of the averment. But then the declaration would not be proved if this were the true construction.

On the other hand, the Court may treat those words as meaning, that, if at some future time the plaintiff shall have released the debt, the defendant will guarantee the same to him. If this be so, the declaration, indeed, will be supported, but the admission will not prove the averment, that, in fact, such a release was executed by the plaintiff.

We think this is the true construction of this guarantie, under all the circumstances of this case.

It would be sufficient, however, to say, that an admission offered by the plaintiff in evidence, but capable equally of either construction, would not be sufficient proof of an averment in a case in which the affirmative lies on the plaintiff.

We think, therefore, that there must be a new trial.

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CASE.—The declaration in substance stated, that John Henry Lewis was proprietor of a certain share or interest, to wit, 2000*l.*, of or in the capital stock or funds of the defendants, standing in his name in the defendants' books, and which capital stock and funds were, according to the statute in that case made and provided, assignable and transferable in the books of the defendants, by the defendants for that purpose making and entering therein such transfer of the said stock and funds to any other person or persons, as the proprietors and lawful possessors thereof for the time being should authorise and require: that John Henry Lewis, being so lawfully possessed, &c., to wit, on

A testator appointed two executors, one of whom formally renounced, the other proved the will and died, leaving effects unadministered:—*Hdd.*, that the renunciation was absolute, the executor not having retracted it, and that it was not necessary to cite him before granting ad-

ministration de bonis non to another person.

The said John Henry Lewis made and published his last will and testament in writing signed by him and duly attested and proved, and thereby gave and bequeathed all his real estate or interest in the said capital stock and funds, to his brother Edmund Burke Lewis (since deceased), and thereby directed the said Edmund Burke Lewis to take and apply the dividends, interest, and annual proceeds thereof for his own use during his natural life; and from and after the decease of Edmund Burke Lewis, the testator gave the interest, &c., to his sister, Caroline Venables (since deceased), for her natural life; and from and after her decease, the testator gave and bequeathed the same absolutely to the plaintiff to his own use; and by his will the said John Henry Lewis then appointed the said Edmund Burke Lewis and David Rowley executors thereof; and afterwards, to wit, on the 8th May, A.D. 1845, died: after whose death, to wit, on the 25th of June, A.D. 1845, Edmund Burke Lewis duly proved the said last will and testament in the Prerogative Court of the Archbishop of Canterbury: the said David Rowley, after the death of the said John Henry Lewis, and before the grant of administration to Caroline Venables, to wit, on the 31st of May, A.D. 1845, in due form of law, in the Prerogative Court of the Archbishop of Canterbury, expressly renounced all his right, title, and interest in and to the probate and execution of the said last will and testament of the said John Henry Lewis, as well as to the letters of administration with the will annexed of all and singular the goods, chattels, and credits of the said deceased John Henry Lewis, if by law the said David Rowley should be entitled thereto; and then wholly refused in any way to act in the execution thereof and thereupon afterwards to wit, on the 13th of July, A.D. 1845, the said Edmund Burke Lewis required the defendants to register and the defendants did register in their books the will of John Henry Lewis, and also the decease of John Henry Lewis and thereupon Edmund Burke Lewis assumed and was lawfully possessed

of and entitled to the said share or interest in the capital stock and funds of the defendants: that Edmund Burke Lewis, on the 1st of November, A.D. 1845, departed this life intestate, and on the 2nd of April, A. D. 1846, administration of all and singular the goods, chattels, and credits which were of the said John Henry Lewis deceased, at the time of his decease left unadministered by Edmund Burke Lewis deceased, executor as aforesaid with the will of John Henry Lewis annexed, in due form of law was granted to Caroline Venables: that afterwards, to wit, on the 19th of November, A.D. 1846, Caroline Venables departed this life; and on the 4th of January, A.D. 1847, administration of all and singular the goods, chattels, and credits which were of John Henry Lewis at his decease, left unadministered by Edmund Burke Lewis and Caroline Venables respectively, with the will of John Henry Lewis annexed, was in due form of law granted to the plaintiff; whereupon the plaintiff as such administrator then became lawfully entitled to the said share or interest of and in the capital stock and funds of the defendants, and to receive from time to time the interest, dividends, and annual proceeds thereof.—The declaration then alleged, that it thereupon became the duty of the defendants, upon the reasonable request of the plaintiff, to register in the books of the defendants the letters of administration with the will of John Henry Lewis annexed, and also the deaths of Edmund Burke Lewis and Caroline Venables; and it also then became the duty of the defendants to enter in their books such transfer of the said share and interest of and in the capital stock and funds of defendants so standing in the name of John Henry Lewis deceased, as the plaintiff should require; and it also became the duty of the defendants to pay to the plaintiff the interest of the said stock.—Averment, that the plaintiff afterwards, to wit, on the 6th of January, 1847, took the letters of the last-men-

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tioned administration with the will of John Henry Lewis annexed to the office of the defendants, and requested them to register the same, and also the deaths of Edmund Burke Lewis and Caroline Venables respectively; and although the defendants did register the letters of administration, and after such registration the plaintiff requested the defendants to make and enter in the books of the defendants a transfer of the said share and interest of and in the said capital stock and funds of the defendants, standing in the name of John Henry Lewis deceased in the defendants' books, to his own name, whereupon it then became the duty of the defendants so to do, yet the defendants refused to make and enter such transfer. The declaration then alleged, that three half-yearly dividends were due in respect of the said stock, which it was the duty of the defendants to pay to the plaintiff as such administrator, yet they wholly refused so to do—concluding with profert of the letters of administration.

Plea, that David Rowley survived Edmund Burke Lewis, and, at the time of the grant of administration with the will annexed to the plaintiff, was living, and that the said renunciation of David Rowley, and his refusal to act in the execution of the will of John Henry Lewis, deceased, were, and each of them was, during the life of Edmund Burke Lewis, and that David Rowley hath not at any time since the decease of Edmund Burke Lewis renounced, nor hath he at any time since the death of Edmund Burke Lewis been applied to, cited, convened, or requested to prove, refuse, or renounce probate or execution of the said last will and testament of John Henry Lewis, deceased; wherefore the defendants say, that the letters of administration in the declaration alleged to have been granted to the plaintiff were and are void, and of no effect in law.—Verification.

Special demurrer, assigning for causes (amongst others), that it is alleged in the declaration, and confessed by the plea, that David Rowley once duly and effectually, and

according to law, renounced all his right, title, and interest in and to the probate and execution of the last will and testament of John Henry Lewis, as well as to the letters of administration with the will annexed; and the plea shews no facts by reason of which such renunciation has become or is ineffectual or void; and that the death of Edmund Burke Lewis did not render it necessary for David Rowley again to renounce such probate and execution of the will and letters of administration; that, after such renunciation by David Rowley, he could not retract his renunciation and refusal until after the death of the plaintiff, as such administrator, or until the plaintiff shall have lawfully ceased to be, or become unable to be, or to act as such administrator.—Joinder in demurrer.

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Butt, in support of the demurrer (*Warren* with him (a)).—One of two executors proves the will, the other formally renounces; the executor who proved dies, and administration de bonis non with the will annexed is granted to the plaintiff; and the question is, whether such administration is valid? For many years, the invariable practice of the Ecclesiastical Court has been that adopted in the present case. In *Wankford v. Wankford* (b), a doubt was expressed whether such a grant of administration was good. The doctrine, however, was fully discussed in the recent case of *Harrison v. Harrison* (c), which is identical with the present, and which decided, that, after an absolute renunciation by one of two executors, it is not requisite that he should renounce a second time, or that he should be cited before granting administration to another. In that case, all the authorities are collected and commented upon by the learned judge, the earliest of which is an anonymous one in *Dyer* (d), E. T., 4 & 5 Phil. & Mary. “*Browne* moved this case at the bar:—A man made two

(a) The case was argued on the 8th and 9th December, 1847, and 19th January, 1848.

(b) 1 Salk. 299.

(c) 1 Rob. Eccl. Rep. 406.

(d) 160 b.

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his executors, and died, and one of them proved the will, and the other refused before the Ordinary, and he committed the administration only to the other; and he made his executors, and died; and the executors brought debt against a debtor of the first testator: whether the action lies or not? And it seemed to *Brooke*, Chief Justice, that it did, inasmuch as, although the refuser might, at his pleasure, have administered, notwithstanding his refusal in the lifetime of his companion, who proved &c., yet, after his death, his election is gone, and the Ordinary may sequester the goods of the first testator, or administer, if he choose; for now, in law, the first testator died intestate," &c. At that period, therefore, the formal renunciation of one of two executors seems to have been considered peremptory. The reporter, indeed, refers to the Year-book, 21 Ed. 4, 28, as tending to raise a doubt as to the correctness of the decision. The next is *Hensloe's case*, 42 Eliz. (a): "Hensloe brought an action of debt against Gage and others, as executors. The defendant pleaded, in abatement of the writ, that the testator made one Hillesley co-executor with them, who had administered &c., not named in the writ. To which the plaintiff said, that, before any administration &c., the said Hillesley, being cited with the others to prove the will before the Ordinary, refused, and the defendant only proved the said will &c.; upon which the defendants demurred in law;" and it was objected, that, after this refusal, Hillesley could not administer. "But it was resolved, without open argument, that the plaintiff's replication to maintain his writ was not sufficient; for, notwithstanding the refusal of Hillesley in this case, he might administer after at his pleasure." That case is only an authority to this extent—that, though an executor has renounced, he *may* afterwards prove the will. The next case is *Pawlet v. Freak* (b), which occurred in 1658: "Upon English bill, the case was, that several

(a) 9 Rep. 36 b.

(b) Hard. 111.

executors were made, and one proved the will, and the rest refused; and he that had proved the will died, and another person took out letters of administration, and preferred his bill in this court; and the Court held clearly, that, by the proving of the will by one, they are all executors; and, although he that proved the will die, yet no other person can administer during the lives of any of the rest; and it does not appear that they who refused are dead. Whereupon the bill was dismissed." With respect to that case, Sir *Herbert Jenner Fust* observes (a), "that it is evidently not well reported;" and, "if it is to be taken literally, it certainly proves too much; for the dictum goes to this length, that, under no circumstance can the Ecclesiastical Court grant an administration when there is an executor surviving; but it may be doubtful in what sense the reporter used the word 'refused'—whether there was *strictly* a refusal." *House v. Lord Petre* (b), which occurred in 1700, can hardly be considered as any authority; for the case is differently stated in the report in Salkeld, and in the judgment of *Holt*, C. J., in *Wankford v. Wankford* (c); and it would seem, from a note by the reporter of *Harrison v. Harrison* (d), that neither is correct. With respect to *Arnold v. Blencowe* (e), which was before the Master of the Rolls in 1778, Sir *Herbert Jenner Fust* says (f), that, "had that case been decided, it might have had some bearing upon the present question; but it was ordered to stand over, for want of parties, and there is no further report of it." The same learned judge also observes, that "the ancient practice in the ecclesiastical courts was, not to allow an executor, against whom a renunciation was recorded, to retract." *Creswick v. Woodhead* (g) will be relied upon as establishing a contrary doctrine; but that case was decided on the authority of

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(a) 1 Rob. Eccl. Rep. 412.

(b) 1 Salk. 311.

(c) Id. 307.

(d) 1 Rob. Eccl. Rep. 415.

(e) 1 Cox, C. C., 426.

(f) 1 Rob. Eccl. Rep. 418.

(g) 4 M. & G. 811.

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Wankford v. Wankford. In *Williams on Executors* (a), it is expressly laid down, that, where there is a sole executor, or several, who all renounce, and administration is granted, the renunciation can never be retracted; but where there are several executors, and some renounce and others prove the will, the renunciation is not peremptory; it may be retracted, according to the practice of the civilians, at any time before an actual grant of administration de bonis non, but not afterwards. In *Wankford v. Wankford* (b), the question before the Court was, whether the debt of an obligor was released by his being made executor of the obligee, though he died without proving the will; and both *Gould, J.*, and *Powys, J.*, point out the distinction between the effect of a formal renunciation and a mere refusal to prove. [*Alderson, B.*—The statute 21 Hen. 8, c. 5, s. 3, only gives the ordinary power to grant administration when the party dies intestate, or the executors refuse to prove the will. Is, then, the renunciation of David Rowley, in the lifetime of Edmund Burke Lewis, such a refusal as would enable the Ecclesiastical Court to grant administration to the plaintiff, after the death of Edmund Burke Lewis?] David Rowley might at that time have come in, and claimed probate; but, not having done so, the letters of administration granted to the plaintiff are valid.

Peacock for the defendant.—The letters of administration are absolutely void. It has been the invariable practice of conveyancers, in cases like the present, to require a subsequent renunciation by the surviving executor. In *Preston on Abstracts* (c), it is said, "If there be several executors, and some renounce, and some prove, those who have renounced must, in the event of their being the survivors, prove the will or renounce; and, till they have renounced, letters of administration with the will annexed cannot be granted with effect. The law

(a) Pt. 1, b. 3, c. 6, s. 2.

(b) 1 Salk. 299.

(c) Vol. 1, p. 187, 2nd edit.

is stated in similar terms, in Preston's edition of Sheppard's Touchstone (a). The only effect of renunciation by one executor in the lifetime of another is, that it tends to prove an intestacy. An executor may retract his renunciation at any time before it has been acted upon, and if one of two executors renounces, the Ordinary cannot grant administration until the other has been cited, and has refused to prove. The authority which the Ordinary has to take a renunciation is for the purpose of ascertaining whether or no there is an intestacy, and for that purpose alone is the renunciation of any avail: *Hensloe's case* (b). The statute 31 Ed. 3, stat. 1, c. 11, enacts, "that in case where a man dieth intestate, the Ordinaries shall depute the next and most lawful friends of the dead person intestate to administer his goods." In Fonblanque on Equity (c), it is said, that, by the term "intestate," must be intended, when one dies without having made a will, or without having named an executor, or, having named an executor, the person so named refuses to act." [Alderson, B.—The 21 Hen. 8, c. 5, s. 3, has the words, "in case any person die intestate, or that the executors named in any such testament refuse to prove the said testament."] *Hensloe's case* shews that a person must be considered as having died intestate, if his executors refuse to prove his will. When one of several executors has renounced, it is in the course of being ascertained whether or no there is an intestacy; then, if another executor proves, that probate operates to give title to every person named in the will as executor. An executor who has renounced may release a debt: *Hensloe's case*; he must join in an action, subject to a plea in abatement; and it is sufficient for executors to declare generally, without stating that they proved the will. The only mode of preventing an executor who has renounced from joining in the action, or releasing the debt, is by summons and severance: Bac.

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(a) Page 462.

(b) 9 Rep. 36 b.

(c) Vol. 2, 387, note.

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Abr. tit. "Executors," (D. 3). Whenever probate has been granted upon proof by one of several executors, the others have a right to act, although they may not have retracted their renunciation. Suppose an action, brought by two executors, one of whom has renounced, and the other proved, and the latter dies after verdict and before judgment, could it be said that the action abates?—if not, the renunciation cannot be absolute. Whether, in such case, it would be necessary again to prove the will, was discussed in *Watkins v. Brent*(a); and it would seem to be unnecessary, for the Ecclesiastical Court having once decided that there is a will, the instrument remains a will until probate is revoked; and by the will the temporal Courts see that the testator has appointed certain persons his executors. Upon the death of an executor who has proved, others having renounced, the survivors, not the executor of the deceased, represent the original testator. The cases collected in *Harrison v. Harrison*, when examined, will be found consistent with the doctrine in *Hensloe's case*, namely, that the only effect of a renunciation is to ascertain whether or no there is an intestacy. Executors, in representing the testator, make but one person: Bac. Abr. tit. "Executors" (D. 3); therefore, in this case, there could be no refusal, under the 21 Hen. 8, c. 5, s. 3, for there never was a time when both executors refused. [*Alderson*, B.—If the Ecclesiastical Court, having jurisdiction over the subject-matter, decides that the renunciation is peremptory, what power have we to question their judgment?] It is the province of the Ecclesiastical Court to decide whether or no there is an intestacy, and, for that purpose, to ascertain whether one or both executors renounce; but it is for this Court to decide upon the effect of such renunciation. That question would distinctly come before the Court, if, to an action by both executors, it were pleaded in abatement, that one had renounced. David

(a) 1 My. & Cr. 97.

Rowley had, during the life of his co-executor, authority to release a debt; then, how could the death of the co-executor deprive him of that right? Or, suppose he had received a debt during the life of his co-executor, in what way could he be compelled to account after the co-executor's death? The Ordinary would have no power to cite him: 2 Wms. Executors, pt. 5, b. 2, c. 3. The expression in the case in *Dyer* (a), "yet after his death his election is gone," can hardly be correct, for all his intermediate acts are valid, though he has renounced. The learned judge, in *Harrison v. Harrison*, does not advert to the distinction pointed out in *Hensloe's case* (b), between a renunciation by one executor or several. There it is said, the executor who proves ought to name those who refuse, in every action to recover the testator's debts, and they may release the whole debt; and it is clear that they who refuse shall have an action by survivor. But it is held, in 36 Hen. 6, 8, that, if a man makes two executors, and both refuse before the Ordinary, now they can never after administer as executors by force of the will, for now the testator dies intestate; otherwise, when one proves, and the other refuses before the Ordinary, the other may administer with him when he will." If, then, all executors have a right to act, notwithstanding some may have renounced, the survivors have the same right after the death of each, and the last surviving executor has the sole right, and ought therefore to be cited before administration is granted to another. *Paulet v. Freak* (c) is an authority in favour of the defendants. The Court there say, "And although he that proved the will die, yet no other person can administer during the lives of any of the rest," thereby meaning, unless the survivor is treated as sole executor, and cited. In *House v. Lord Petre* (d), it

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(a) 160 b.

(b) 9 Rep. 36 b.

(c) 1 Hard. 111.

(d) 1 Salk. 311.

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appears that the surviving executor did renounce after the death of the co-executor, who proved. In *Arnold v. Blencowe*(a), there were four executors. A. alone, proved the will. B, C, and D. renounced probate. A. died, leaving executors, who proved his will; and the Master of the Rolls thought that the renouncing of B. and C. and D. in the lifetime of A., was a mere nullity; for they might, notwithstanding their having renounced, come in at any time and prove, and the testator would not be unrepresented until the surviving executor renounced after the death of his companions. There is no doubt that the present question is one which is proper for the decision of the temporal Courts, where the matter will be adjudicated upon according to the common law. In *Robinson v. Pett* (b), *Talbot*, C. J., said, "The defendant's renouncing the executorship is not material, because he is still at liberty, whenever he pleases, to accept of the executorship; otherwise, if both the executors had renounced, and the Ordinary had thereupon granted administration." The preceding quotation was adopted by *Tindal*, C. J., in *Creswick v. Woodhead* (c). How can the death of the co-executor operate upon the renunciation of the other executor? In *Scott v. Briant* (d), it was held, in a sci. fa. by executors to revive a judgment obtained by the testator, that all who are named executors in the will may join, though one only has proved. *Littledale*, J., there says, "The will having gone into the Ecclesiastical Court, and having been there recognised by the granting of probate to one, all who are named in it as executors are recognised as such;" and he cites Bro. Abr. "Executors," pl. 27. The probate acts for the benefit of all the executors. [He also cited *Cottle v. Aldrich* (e), *Strickland v. Strickland* (f),

(a) 1 Cox, C. C. 426.

(b) 3 P. Wms. 251.

(c) 4 M. & Gr. 814.

(d) 6 N. & M. 381.

(e) 4 M. & Sel. 175.

(f) 12 Sim. 253.

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Butt, in reply.—The question is simply, whether this administration is absolutely void or not. It remains good; in the absence of any authority by which it is shewn to be void. The Ecclesiastical Court has passed its judgment upon the subject-matter, and that judgment cannot be impeached upon any collateral point. The argument of the defendant, in effect, amounts to this—that the Spiritual Court has not had sufficient evidence before it to warrant its judgment and the course of proceeding. It might equally be objected in this Court, that the mode in which the evidence was taken in the Spiritual Court was improper and informal; and, therefore, that these letters of administration are void. This is a matter which has been adjudicated upon by a court of competent jurisdiction; and it is not open to this Court to enter again upon the subject-matter; for, as Lord *Denman*, C. J., in his judgment in *Carus Wilson's case* (c), said, if that were to be done, “we should constitute ourselves a court of error from such other court, and should be constantly examining whether the circumstances, the existence of which was proved, warranted the opinion which such Court had formed.” There has been no authority adduced which establishes the proposition, that a second renunciation is required. The cases cited do not decide the matter, and the grant in the present case is according to the invariable practice of the Ecclesiastical Court; and, to use the words of Sir *Herbert Jenner Fust*, “such practice ought not hastily to be departed from.” The defendant’s argument would altogether dispense with the necessity of the Ecclesiastical Court. Suppose, on the death of the executor who proved,

(a) 1 Y. & J. 409.

(b) 2 Scho. & Lef. 231.

(c) 7 Q. B. 1008.

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the executor who has renounced were allowed in some distant country, it is very necessary to give him before letters of administration could be granted much inconvenience would arise with respect to the disposal of the assets in the near time. This grant of administration is a judicial and not a ministerial act. The Ecclesiastical Court has decided that the renunciation, which is a mere matter of fact, was sufficient to permit the grant. The letters of administration are therefore not void, and the plea is bad. (He also cited *Rawlinson v. Shaw* (a), *Allen v. Dardou* (b), *Mead v. Stokes* (c), *Toller on Executors*, 119.]

Cur. adv. vult.

The judgment of the Court was now delivered by

ROUSE, B.—This was an action on the case, brought by the plaintiff, as administrator de bonis non cum testamento annexo of John Henry Lewis deceased, against the East India Company, for not permitting him to transfer certain stock, standing in their books in the name of the deceased, and for not paying to him the dividends due in respect of that stock.

The material facts, as they appear on the pleadings, are as follows:—John Henry Lewis by his will made Edmund Burke Lewis and David Rowley his executors. John Henry Lewis died, and Edmund Burke Lewis alone proved the will; the other executor, David Rowley, in the lifetime of Edmund Burke Lewis, in due form of law in the proper Ecclesiastical Court, expressly renounced all his right, title, and interest, in and to the probate of the will, and refused in any way to act in the execution thereof. Edmund Burke Lewis the executor afterwards died, and thereupon letters of administration de bonis non cum testamento annexo were granted to Caroline Venables, and

(a) 3 T. R. 557. (b) Id. 125. (c) 4 Id. 561.

afterwards, on her decease, to the present plaintiff. David Rowley, though still alive, was not cited after the death of Edmund Burke Lewis to prove or renounce probate. The stock in question stood, and still stands, in the name of the deceased John Henry Lewis, in the books of the East India Company; and they have refused to permit the plaintiff either to transfer it or to receive the dividends.

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The question is, whether, upon these facts, the plaintiff is the legal personal representative of John Henry Lewis? If he is, then he is certainly entitled to the stock and dividends standing in the name of the deceased, and will be entitled to our judgment. If he is not, then the defendants are entitled to judgment.

The question was very fully and ably argued before us, and numerous authorities were cited; but the point after all turns on the construction to be given to the statute 21 Hen. 8, c. 5, s. 3. It is there enacted, that, in case any person die intestate, or the executors named in any testament refuse to prove the same, then the Ordinary shall grant administration to the widow or next of kin, or to both, as he may think fit. The power of granting administration, where there is a will, exists only where the executors have refused to prove; and the argument for the defendants was, that the executors had not, in the present case, refused to prove, and so that there was no jurisdiction in the Ordinary to grant administration to the plaintiff. In the first place, though the statute speaks of executors in the plural, yet it certainly applies to the case of a single executor, as well as to that of many; and, inasmuch as on the death of Edmund Burke Lewis, David Rowley became the sole executor named in the will, the only question is, whether his refusal, in the lifetime of Edmund Burke Lewis, was a refusal within the statute? The plaintiff contends that it was, the defendants that it was not.

If the decision of the question is to depend on the doc-

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trine of the Ecclesiastical Court, there is no doubt but that the title of the plaintiff is complete.

The precise point was brought under the consideration of the Prerogative Court, in the year 1846, in a case of *Harrison v. Harrison*, to be found in the second volume of Dr. Robertson's Reports, p. 406. Sir *Herbert Jenner Fust*, in an elaborate judgment, there states the practice of the ecclesiastical courts to have been uniformly in favour of such grants of administration as that in the present case. Those courts, according to the opinion of that eminent judge, have always treated the formal renunciation of an executor as an act absolutely binding on him—an act which, according to the more ancient authorities, he never could be permitted to retract, but which, in modern times, he has been allowed, under certain circumstances, to set aside, though, until he does so, it is still absolutely binding and conclusive.

After that judgment of Sir *Herbert Jenner Fust*, we must assume the doctrine of the Ecclesiastical Court on this matter to be settled. But, on the part of the defendants, it was argued, that, on this point, we are to be governed, not by the Ecclesiastical Courts, but by the principles of the common law; and that, according to those principles, a grant of administration, under circumstances like the present—that is to say, a grant without a refusal or citation *after the death of the executor* who has proved, is simply void; that the Ecclesiastical Court had no authority to make any such grant, and so that no length of practice can give validity to such a grant.

It is certainly true, whatever may have been the practice of the Ecclesiastical Courts, that, if there has not been such a refusal by Rowley, the surviving executor, as was intended by the statute, the grant to the plaintiff has been made without authority, and is, therefore, a mere nullity; but when it is once ascertained that the refusal has been made at the time and in the manner which has always been treated by eccle-

siastical courts as absolutely binding on the party making it, till he has of his own accord come forward to set it aside, we ought to be very sure that the continued practice of those Courts has been founded in error, before we decide against the validity of what has been done in conformity to it. Sir *Herbert Jenner Fust* states, in his judgment in *Harrison v. Harrison*, that the grant in that case (which is precisely like the present) was made in conformity with the invariable practice of the Court; and he goes on to say, that he has been unable to discover that any such grant was ever called in question. If the argument of the defendants in this case is to prevail, all acts done on the faith of such grants are absolutely null and void. No payment made to an administrator so constituted will be a discharge to the party making it; and no title acquired under such an administration can stand. On what, then, is it that the reasoning, which is to lead to consequences so inconvenient, rests? It is said, that no administration can be granted unless where there has been a renunciation by all the executors, and that, in the present case, there has been no such renunciation; for that, at the time when Rowley renounced, his co-executor was alive, and so the probate by him enured to the benefit of Rowley as well as of himself. The meaning of the statute, it is argued, is, that the renunciation, or, as it is there called, the refusal, must be such, that, when made, there is no one to act as executor; which is not the case where the renunciation or refusal is made in the lifetime of another executor, who both proves and acts. The argument is unanswerable, if the statute really is to be construed in the mode contended for. But what is there to warrant such a construction? The statute, in case of a party dying intestate, gives power to the Ecclesiastical Court to grant administration only where the executors have refused; but as to the time when, and the manner in which, the refusal is to be made, the statute is silent; and unless, therefore, we can discover

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some common-law authority clearly conflicting with that of the Ecclesiastical Courts, we shall feel ourselves bound by the decision in *Harrison v. Harrison*. Now, when the authorities in the temporal Courts are examined, it will appear that there is no decision which warrants the proposition contended for by the defendants. It is true there are some dicta giving countenance to the doctrine contended for; but even these are of equivocal import, and, having been unnecessary for the decision of the cases in which they occur, cannot, as we think, be allowed to weigh against the uniform practice of the Ecclesiastical Courts.

There are three cases at common law principally relied on by the defendants; namely, *Hensloe's case* (a), *Lord Petre's case* (b), and *Wankford v. Wankford* (c).

But the points decided in those cases do not bear out the proposition contended for by the defendants. In *Hensloe's case*, the point determined was, that where an executor has renounced, but afterwards administered, he must be joined as a defendant with the co-executors who have proved.

In *Lord Petre's case*, according to the report in Salkeld, there were two executors, A. and B. A. alone proved, and died, making executors, and afterwards B. renounced. It was held, that by the renunciation of B., the original testator was dead intestate, and the Ordinary might grant administration de bonis non. It would seem, however, from *Dr. Robertson's* note, in his report of *Harrison v. Harrison* (d), that neither the report in Salkeld, nor Lord *Holt's* statement of the case, as given in *Wankford v. Wankford*, can be relied on. Be that as it may, the case certainly does not bear out the proposition now contended for. The same observation applies to *Wankford v. Wankford*, where the only point decided was, that when a deceased creditor had made his debtor

(a) 9 Rep. 36 b.

(b) 1 Salk. 311.

(c) 1 Salk. 299.

(d) Page 415.

executor, and he administered, the debt was released though the debtor died without having proved.

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Besides these three common-law authorities, the defendants also relied on two equity cases; first, on an old case of *Powlet v. Freake* (a); and, secondly, a case of *Arnold v. Blancowe*, before Sir *Lloyd Kenyon*, at the Rolls, reported 1 Cox, 458. The report of the former case is so very short and loose that little reliance can be placed on it. It would seem to lay down broadly, that after probate by one of several executors, the rest renouncing, no administration can be granted after the death of the executor who has proved, till all the other executors have died. This is so clearly incorrect, that we must suspect there is some error in the report.

The other case, *Arnold v. Blancowe* (b), only decided, that where one of several executors alone proved, and died leaving his co-executors surviving, his executors did not represent the original testator.

These cases fall very far short of establishing the proposition contended for by the defendants. We are, however, aware that in *Hensloe's case* (c), Lord *Coke* goes at length into the general doctrine of probate, and lays down some propositions on which the defendants in the present case rely, and which seem, *primâ facie* at least, to establish their point. We refer particularly to what he says fo. 38 a and 38 b: "The spiritual Courts," he says, "have not power to take the refusal of any, when any of the executors prove; and therefore, the refusal of any of the executors before the Ordinary in such case is void." And again, "Forasmuch as the ecclesiastical judge has no power to receive that refusal, it is upon the matter made to a stranger, and by consequence void, and of no force to bar the plaintiff to take it afterwards." The question here is, what does Lord *Coke* mean by *the refusal being void*, and the *ecclesi-*

(a) Hard. 111.

(b) 1 Cox, 458.

(c) 9 Rep. 38 a, 38 b.

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astical judge having no power to take such a refusal? There is no doubt the refusal is void, if the party refusing afterwards chooses to act; and, possibly, this is all which Lord *Coke* meant. If he meant to carry the doctrine further, and to lay down, that a refusal by one executor, in the lifetime of a co-executor proving, is void for all purposes, and can, under no circumstances, place the executor so refusing in any different situation from that of an executor who has not refused, then we have to decide between the conflicting authority of the dictum of Lord *Coke*, on the one hand, and of the uniform practice of the Ecclesiastical Court, on the other; and we feel bound to adopt the rule as it has been followed by the Ecclesiastical Court. The statute of Hen. 8 being silent as to the time at which, and the mode in which, the refusal is to be made by the executor, we think, that provided there is a refusal, it must be left to the practice of the Ecclesiastical Court to determine when and how that refusal is to be made. The Ecclesiastical Court treats a refusal by one of several executors as an act defeasible, if the refusing executor chose to retract it at any time before administration granted—otherwise absolute; and we see nothing in the statute, militating against this construction of the act of the Court, which must be regulated by their practice.

The party making the renunciation must be presumed to be cognisant of the construction put on his act by the Court; and, consequently, to intend, that, if he does not alter his determination, the act must be considered as an absolute renunciation, on the death of the executor who has proved.

We therefore think, either that Lord *Coke* must have meant merely, that a renunciation in the lifetime of the executor who has proved, is inoperative to defeat the right of the renouncing party to act afterwards; or, if he meant to go further than that, he was laying down a doctrine not necessarily flowing from the statute of Hen. 8, and to

which, as being at variance with the constant, and, as we think, very reasonable practice of the Ecclesiastical Court, we cannot accede.

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We do not think it necessary to examine the authorities more in detail. They are all considered in the judgment of Sir *Herbert Jenner Fust*, to which it is sufficient for us to refer.

It may, however, be well to remark, in passing, that our judgment in no respect trenches on the decision of Sir *E. Sugden*, in *Cummins v. Cummins* (a). The point there decided was, that an executor who had not renounced, and to whom power was reserved to come in and prove, might, after the death of the executors who had proved, be sued as an executor, if he had in fact administered, although he had not himself taken probate. Nor does our judgment in any manner affect the doctrine, that, during the life of the executor who proved, his renunciation shall be deemed void for the purpose of suit, and his name must be joined as a co-plaintiff.

On the ground, therefore, that, though the statute of Hen. 8 requires a refusal by the executor before any grant of administration can be made, yet it is silent as to the time when the refusal is to be made; and the Ecclesiastical Courts (to which, by the Statute of the Clergy, 18 Ed. 3, stat. 3, c. 6, the cognisance of cases testamentary is declared notoriously to appertain) have invariably treated a formal refusal, made in court at any time after the testator's decease, as binding, unless the refusing party afterwards, of his own accord, comes in and retracts his refusal; and, inasmuch as there is no decision in the temporal Courts conflicting with this uniform practice, such practice being consistent with the statute, and perfectly reasonable, we think that the letters of administration in this case are not void; and so there must be

Judgment for the plaintiff.

(a) 3 J. & L. 91.

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July 11.

FREEMAN and Another, Assignees of WILLIAM BROADBENT,
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In trover by the assignees of a bankrupt against a sheriff, for the conversion of the bankrupt's goods, seized under a fi. fa. against C. and D., it appeared, that, immediately before the seizure, the bankrupt told the officer that the goods were the property of C.; and, immediately afterwards, he contradicted that statement, and said they were the goods of D. The jury found, that the goods were in reality the bankrupt's; but also, that he represented the goods to

TROVER by the plaintiffs, as assignees of William Broadbent, for the conversion of certain goods of the bankrupts before the bankruptcy. The defendants pleaded not guilty, not possessed, and leave and license. The plaintiffs joined issue upon the two first pleas, and traversed the last, upon which traverse issue was joined. At the trial, before *Alderson*, B., at the last Liverpool Spring Assizes, it appeared that the defendant was the sheriff of Yorkshire, and that his officers had seized the goods in question, under a writ of fi. fa., against Joseph and Benjamin Broadbent; that William Broadbent, in anticipation of a distress, had removed the goods, (which there was evidence to shew were his,) to the house of his father Joseph, and afterwards to the house of his brother Benjamin; that, when the officers entered Benjamin's house, the bankrupt told them they were the goods of his brother Benjamin, (supposing, as it would seem, that the writ was against himself). The writ, being produced, was against Benjamin. William then told the officers that the goods belonged to another brother, and, finally, that they were his

the officer as the goods of C., so as to induce the officer, by that false representation, to seize them:—*Held*, that, under the plea of not possessed, this finding did not estop the bankrupt, and the plaintiffs as assignees, from complaining of the seizure of the goods as their own.

The rule laid down by the Court of Queen's Bench, that, "where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time;" and, again, "a party who negligently or culpably stands by, and allows another to contract on the faith of a fact which he can contradict, cannot afterwards dispute that fact in an action against the party whom he has himself assisted in deceiving," is to be taken with this explanation, that, by the term "wilfully," must be understood, if not that the party represents that to be true which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real meaning may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and that conduct, by negligence or omission, when there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect.

own. The goods were then seized, and sold as those of Benjamin. It was contended, by the defendant's counsel, that the statements and conduct of the bankrupt operated as conclusive evidence against him; that the property was not his at the time of the conversion, and that the assignees were also bound. The jury found, that the goods were, in fact, William's, and also, "that William represented the goods to the sheriff's officers as the goods of Benjamin, so as to induce them, by that false representation, to seize the goods." The plaintiff, under the direction of the learned judge, obtained a verdict, leave being reserved to the defendant to move to enter a verdict in his favour on any of the issues.

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Knowles having obtained a rule accordingly,

Watson, Atherton, and H. Hill, shewed cause (June 22).—In this case the jury found, that the goods were the goods of Benjamin, although they also found, that the officers were misled by his misrepresentation that the goods belonged to his brother. No doubt, the statements and representations of the bankrupt were evidence of a cogent nature as against his assignees; but they were not estopped by these representations from shewing that, in truth and in fact, the goods were those of the bankrupt. The sheriff is bound, at his peril, to seize the goods of the proper party. Suppose he had arrested the wrong person, he could not have been justified had the person arrested said he was the party against whom the writ issued. Thus, in *Coote v. Lighworth* (a), "Coote brought false imprisonment against Lighworth, who justified, for that he had a warrant to arrest J. David. He asked of Coote what was his name, who answered, that his name was J. David; per quod, he arrested him. The plaintiff demurred, and it was adjudged for the plaintiff; for the defendant ought at

(a) Moore, 457.

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his peril to have taken notice of the party;" and *Hale*, C. B., in *Thurbane's case* (a), expresses his opinion to the same effect: "If a wrong man be taken, though he affirm himself to be the person against whom the commission is awarded, yet, the commissioners having no warrant to take him by their commission, his affirming himself to be the person will not excuse them in false imprisonment, as has been held upon the executing of a *capias*." In a case where the real party was taken, but by the wrong christian name, but which he stated at the time to be his proper name, it was held, that he could not maintain trespass: *Price v. Harwood* (b); but there, it appeared that he was known by one name as well as the other. [*Alderson*, B.—I was present during the trial of that case; and I think I remember Lord *Ellenborough* said, that he knew a case where one of two brothers had procured himself to be arrested for the other, and an action by him for false imprisonment failed. *Parke*, B.—The first part of Lord *Ellenborough's* decision in that case was correct, and is according to what is laid down in Com. Dig., "Imprisonment," L. (2); but what followed is merely a dictum.] There is no difference in principle between the seizure of the wrong goods or the arrest of the wrong party. The present question has, no doubt, never before been raised. This representation of the bankrupt does not fall within the rules, as laid down by the Court of Queen's Bench in *Pickard v. Sears* (c), and *Gregg v. Wells* (d). In the latter case, *Denman*, C. J., says, "A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving." In those cases, the question was, whether or not the party standing by and allowing the *sale* of his property,

(a) Hard. 323.

(b) 3 Camp. 108.

(c) 6 A. & E. 469.

(d) 10 A. & E. 98.

was not to be taken to have concurred in it. No doubt the principle expounded by Lord *Denman*, in those cases, is rather broadly laid down. [*Parke, B.*—It would seem, that the negligence must be in the nature of a neglect of some duty cast upon the party who is guilty of it. *Alderson, B.*—A person cannot be said to be culpable in not doing a particular thing, unless it is his duty to do it.] There was no duty cast on the bankrupt to say whose goods these were. The case of *Coles v. The Bank of England* (a) was well considered; but it is difficult to see how it can be supported. This matter is not an estoppel, as several requisites to create an estoppel are wanting. If it is, it ought to have been pleaded. [*Parke, B.*—Where a matter ought to be pleaded, and is not, it is left at large. It is questionable whether it be necessary to reply matter in pais to a plea which contains no affirmative matter, and concludes to the country. His Lordship referred to *Doe v. Wellsman* (b); *Armstrong v. Norton* (c); *Magrath v. Hardy* (d); *Sanderson v. Colman* (e); *Doe v. Huddart* (f); *Doe v. Wright* (g); *Doe v. Oliver* (h).] It would not form a good replication in substance, by way of estoppel; it is insufficient, in many respects, according to the rules laid down in Com. Dig., "Estoppel," and Co. Lit. 352. a. The statement of the bankrupt was ambiguous: he said they were the goods of Benjamin; but he did not state that they were *solely* his. An estoppel should be precise. This was a mere naked falsehood. If the bankrupt intended to assign his goods by his act, it would be an act of bankruptcy: *Hooper v. Smith* (i). [*Platt, B.*—He did not intend to do so; for it appears by the evidence, that he made the statement for the pur-

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(a) 10 A. & E. 437.

(b) 2 Exch. Rep. 368.

(c) 2 Ir. L. Rep. 96.

(d) 4 Bing. N. C. 782.

(e) 4 M. & G. 209.

(f) 2 C. M. & R. 316.

(g) 10 A. & E. 763.

(h) 5 M. & R. 202.

(i) 1 Bla. 441.

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pose of saving the goods from seizure.] The facts, as they were found by the jury, would not support a replication by way of estoppel. The language of *Parke*, B., in delivering the judgment of this Court, in *Lyon v. Reed*(a), is very applicable to the present case. He there says, "The acts in pais, which bind parties *by way of estoppel*, are but few, and are pointed out by Lord *Coke*, in Co. Lit. 352. a. They are all acts which anciently really were, and, in contemplation of law, have always continued to be, acts of notoriety, not less formal and solemn than the execution of a deed, such as *livery, entry, acceptance of an estate*, and the like. Whether a party had or had not concurred in an act of this sort, was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed." [They also cited *Armani v. Castrique*(b), and *Collins v. Evans*(c).]

Knowles, (*Hall* with him,) in support of the rule.—According to the authority of *Pickard v. Sears*(d), and *Gregg v. Wells*(e), and the principles there laid down, the plaintiffs are estopped. [*Parke*, B.—One way to consider whether or not the facts here amount to a defence, is to see whether the facts, if embodied in a plea, would make a good plea by way of estoppel to an action brought by William Broadbent in his own name, and averring that the goods were his.] The older cases which have been cited do not bear much upon the question. There may be a distinction between an arrest of a person and the seizure of goods, as the old action of trespass to the person included also a breach of the peace. The case of *Pickard v. Sears* is not so strong as the present, for here the falsehood was wilful and intentional, which was not so there. In the case last

(a) 13 M. & W. 309.

(b) Id. 443.

(c) 5 Q. B. 820.

(d) 6 A. & E. 469.

(e) 10 Id. 90.

cited, the plaintiff did not assert that the goods were his: he sanctioned the act by not interfering; and it was held, that he was bound by his conduct. [*Parke, B.*—In *Heane v. Rogers* (a), *Bayley, J.*, says, “There is no doubt but that the express admissions of a party to the suit, or admissions implied from his contract, are evidence, and strong evidence, against him; but we think that he is at liberty to prove that such admissions were mistaken, or were untrue, and is not estopped or concluded by them, unless another party has been induced by them to alter his condition; in such a case, the party is estopped from disputing their truth, with respect to that person, (and those claiming under him,) and that transaction, but as to third parties, he is not bound;” and he afterwards proceeds to say, that, “It is not necessary to refer particularly to the cases in which a bankrupt has been precluded from disputing his commission, and which were cited in argument. The earlier cases fall within the principle above laid down. In *Clarke v. Clarke* (b), the bankrupt was not permitted to call that sale a conversion, which he himself had procured and sanctioned. In *Like v. Howe* (c), he was precluded from testing the title of persons to be assignees, whom he, by his conduct, had procured to become so; and the last case on this subject, *Watson v. Wase* (d), is distinguishable from the present, because Wase, one of the defendants, was the person from whose suit the plaintiff had been discharged; and therefore, perhaps, he might be estopped with respect to that person, by his conduct towards him.” In *Pickard v. Sears*, the Court had the case of *Heane v. Rogers* before them. I think you will find that the person who makes a statement, on which another alters his position, is not estopped, unless he so induces the latter to alter his position, that the former would be responsible

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(a) 9 B. & C. 586, 588.

(b) 6 Esp. 61.

(c) 6 Esp. 20.

(d) 5 B. & C. 153.

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to him in an action for it. In the present case, the bankrupt makes one statement one moment, and another and a different one the next. There is no way of stating the facts, to shew that the bankrupt authorised the act, or that there was such a deceitful representation, known by the bankrupt to be false, and made with the intent that the defendant should seize the goods, or so made as to cause the defendant, acting as a reasonable man, to seize the goods.] In *The Sheffield, Ashton-under-Lyne, and Manchester Railway v. Woodcock* (a), Parke, B., says, "It is a universal rule of law, that, where a party makes a representation to another, whereby the situation of the latter is altered, he is bound thereby." *Banks v. Newton* (b) is an authority to the same effect. [Alderson, B.—Culpability includes will: negligence may, or may not; consequently, the language of Lord Denman, in *Gregg v. Wells* (c), must be understood with reference to such negligence as would imply will.] *Coles v. The Bank of England* proceeded on the assumption, that the testatrix did not in fact know of the diminution of her stock, but was guilty of negligence in receiving without objection the dividends on the sums reduced. The principle there established is, that if a party negligently omits to contradict an assumed state of facts, when he might or ought to contradict them, he is concluded by it. [Parke, B.—You do not mean to argue, that, if a person makes a mis-statement, without any intention that another party should act upon it, and when he could not expect that another party would act upon it, that, in such case, he is bound? If the estoppel be carried to this extent, viz. where a party makes a representation, under such circumstances that a reasonable man might naturally infer that it was intended that he should act upon it, then this case does not fall within that principle.

(a) 7 M. & W. 574.

(b) 16 L. J., N. S., Q. B., 142.

(c) 10 A. & E. 90.

In *Pickard v. Sears* (a), the Court say, "The rule of law is clear, that, where one by his words or conduct *wilfully* causes another to believe the existence of a certain state of things, *and* induces him to act on that belief, so as to alter his own previous position, the former is concluded," &c. If the word "wilfully" be read as overruling both propositions, that is, no doubt, correct.] Here the seizure was under circumstances which would lead a reasonable man to believe the mis-statement, and act upon it. [He also cited *Wilson v. Stubs* (b).]

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The judgment of the Court was now delivered by

PARKE, B.—In this case, which was argued before my Brothers *Alderson*, *Rolfe*, *Platt*, and myself, at the sittings after the last term, we are all of opinion that the rule ought to be discharged.

It was an action of trover, by the assignees of William Broadbent, against the Sheriff of Yorkshire, for goods of the bankrupt. There were pleas of not guilty, not possessed, and leave and license. The conversion was the seizure of the goods by the defendant's officers, under a *fi. fa.* against Joseph and Benjamin Broadbent. It appeared, that, when the officers entered, the bankrupt told them the goods seized were the property of *Benjamin*; he did so, supposing that they had no writ against Benjamin. Afterwards he contradicted that statement, and said they were the goods of his brother Joseph. It was contended, that this representation bound William, because it induced the officers to seize; and that he could not complain of that act, nor could the assignees who claimed under him. My Brother *Alderson* left a question to the jury upon this part of the case, the finding on which he reserved for the consideration of the Court, giving leave to enter a verdict

(a) 6 A. & E. 469.

(b) Hob. 330.

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for the defendant on the issue on the plea of not possessed. The jury found, that the goods were really William's; but they also found, "that William represented the goods to the sheriff's officer as the goods of Benjamin, so as to induce him, by that false representation, to seize them;" and the question is, whether this finding is sufficient to estop the bankrupt and the plaintiffs as assignees, from complaining of the seizure of these goods as their own?

The case was very fully argued before us, and many questions discussed on the law of estoppels, on which it is unnecessary to give an opinion. It is certain that estoppels by record and by deed must, in order to make them binding, be pleaded, *if there be an opportunity*, otherwise the party omitting to plead it waives the estoppel, and leaves the cause at large, on which the jury may find according to the truth: *Trevithar d. Trevithar v. Lawrence* (a); *Magraith v. Hardy* (b). With respect to estoppels in pais, in certain cases there is no doubt they need not be pleaded in order to make them obligatory. For instance, where a man represents another as his agent, in order to procure a person to contract with him as such, and he does contract, the contract binds in the same manner as if he made it himself, and is his contract in point of law; and no form of pleading could leave such a matter at large, and enable the jury to treat it as no contract. The same rule appears to apply to all similar estoppels in pais, as the learned editor of Wms. Saund. (Vol. 1, p. 326, n. 2) expresses his opinion. The estoppel, therefore, if it be one created by the conduct of the bankrupt in this case, is not opened by the omission to plead it; and the only question is, whether it be an estoppel? It is contended that it was, upon the authority of the rule laid down in *Pickard v.*

(a) 2 Ld. Raym. 1051; Salk. 277.

(b) 4 Bing. N. C. 782.

Sears (a). That rule is, "that, where one, by his words or conduct, *wilfully* causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." That was founded on previous authorities, in the cases *Greaves v. Key* (b), *Hearne v. Rogers* (c), and has been acted upon in some cases since. The principle is stated more broadly by Lord *Denman*, in the case of *Gregg v. Wells* (d), where his Lordship says, that a party who *negligently* or *culpably* stands by and allows another to contract on the faith of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving. Whether that rule has been correctly acted upon by the jury in all the reported cases in which it has been applied, is not now the question; but the proposition contained in the rule itself, as above laid down in the case of *Pickard v. Sears*, must be considered as established. By the term "*wilfully*," however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect. As, for instance, a retiring partner omitting

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(a) 6 A. & E. 474; *S. C.*, 2
N. & P. 486.
(b) 2 B. & A. 318.

(c) 9 B. & C. 586.
(d) 9 A. & E. 97.

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to inform his customers of the *fact*, in the usual mode, that the continuing partners were no longer authorised to act as his agents, is bound by all contracts made by them with third persons, on the faith of their being so authorised. But if we apply this rule, either in the terms in which it is enunciated in *Pickard v. Sears*, or as it is above expounded, the finding of the jury is insufficient to entitle the defendant to have a verdict entered for him on the plea of not possessed. It is not found that he intended to induce the officer to seize the goods as those of Benjamin; and, whatever intention he had on his first statement, was done away with by an opposite statement before the seizure took place. Nor can it be said that any reasonable man would have seized the goods on the faith of the bankrupt's representation, *taken altogether*. In truth, in most cases to which the doctrine in *Pickard v. Sears* is to be applied, the representation is such as to amount to the contract or license of the party making it. Here there is no pretence for saying it amounted to a license, and a contract is out of the question. We therefore think that the rule must be discharged.

Rule discharged.

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ASSUMPSIT for use and occupation. Plea, non assumpsit, except as to 90*l.*, and payment of that sum into court, with averment of no damages ultra. Replication, damages ultra; upon which issue was joined.

At the trial, before Lord *Denman*, C.J., at the Surrey Spring Assizes, 1847, it appeared that the action was brought to recover 223*l.* 2*s.* 6*d.* for the use and occupation of a dwelling-house for four years and a quarter, ending at Christmas, 1846. The house in question was one of many others, called the Castlenau Villas, in the Hammersmith-bridge Road, which had been built by the plaintiff on land demised to him for a term of years by a building lease from the freeholder. This lease contained certain covenants on the part of the lessee, applicable to all the houses, and for a breach of which as to any one house, the lessor became entitled to re-enter upon the whole. The defendant was let into possession under an agreement to purchase the plaintiff's interest in the house in question for 630*l.*, subject to the covenants in the building lease; but he refused to complete the purchase, on the ground that the title was not marketable, by reason of the above-mentioned right of re-entry. The plaintiff thereupon filed a bill in Chancery, praying a specific performance of the agreement; and the defendant having put in an answer, the suit was heard and a decree made, that the bill be dismissed with costs. In order to prove the agreement to purchase, the defendant, who had given notice to produce it, did not call for it, but tendered in evidence the bill in equity, which set out the agreement *verbatim*. It was objected, that the

A bill in Chancery is not evidence of the truth of the facts stated in it, as against the party in whose name it is filed, even though his privy be shewn, but is only admissible to prove that a suit was instituted, and the subject-matter of it.

Semble, that pleadings in equity as well as at common law are not to be treated as positive allegations of the truth of the facts therein, for all purposes, but only as statements of the case of the party, to be admitted or denied by the opposite side, and if denied, to be proved and ultimately submitted for judicial decision.

The facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are con-

clusive evidence between them; so are the material facts alleged by one party which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, if the traverse is found against the party making it. But the statements of a party in a declaration or plea, though for the purposes of the cause he is bound by those that are material, ought not, it should seem, to be treated as confessions of the truth of the facts stated.

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statements in the bill were inadmissible in evidence against the plaintiff; but the learned judge received the bill on some evidence, and the jury having found that the amount paid into court was a sufficient compensation for the occupation, from the time the suit terminated until Christmas 1846, his Lordship directed a verdict for the defendant, reserving leave for the plaintiff to move to enter a verdict for him in respect of the previous occupation, if the Court should be of opinion that the bill in equity was inadmissible (a).

A rule nisi having been obtained accordingly,

Lush shewed cause (b).—The question is, whether statements in a bill in Chancery, upon which the plaintiff founds his claim to relief, are evidence against him in an action between the same parties? A parol admission by the plaintiff, that the agreement set out in the bill had in fact been made, would, no doubt, have been receivable in evidence:—*Slatterie v. Pooley* (c); *Howard v. Smith* (d), and it is difficult to see why the same statement, made in proceedings in court, should not be equally admissible. [Parke, B.—Under the old system of pleading, a declaration might contain twenty different statements of the same cause of action. Do you contend that every count would be evidence against the plaintiff of so many different contracts? The question is not as to the effect of the evidence, but whether the plaintiff's declaration can be altogether excluded. In Buller's Nisi Prius, p. 235, it is said, "The bill in Chancery is evidence against the complainant, for the allegations of every man's bills shall be supposed true or shall it be supposed to be preferred by a counsel or

(a) It was also objected, that the decree was not properly proved; but the judgment of the Court renders it unnecessary to notice the argument on that point.

(b) The case was argued in

Hilary Term, 1848, on the 22nd and 29th of January, and at the Sittings in Banc after that term on the 5th of February.

(c) 6 M. & W. 664.

(d) 3 Scott N. R. 574.

solicitor without the party's privity; and therefore it amounts to the confession and admission of the truth of any fact, and if the counsel have mingled in it any fact that is not true, the party may have his action; but in order to make the bill evidence against the complainant, there must be proceedings upon it; for if there were no proceedings upon it, it should rather be supposed to be filed by a stranger to bar the party of his evidence." The authority there cited is *Snow v. Lord Crawley v. Phillips* (a), which decided, that if a patron sue the parson on a bond, and the latter prefer his bill in Chancery for relief, stating the bond to be a simoniacal contract, the bill and proceedings upon it are evidence for the plaintiff in an ejectment to recover the rectory. A subsequent passage, in Buller's *Nisi Prius* (b), points out the distinction between the case of a bill for relief and a bill for discovery. It is there said:—"But on an issue directed out of Chancery to try the validity of a deed, where one J. N. was produced to prove he wrote it by the direction of Lord Ferrers, in 1720, and to contradict his evidence the plaintiff produced a bill in Chancery preferred in 1719 by the defendant, which mentioned the deed, the Court would not suffer it to be read though an answer had been put in, because it was no more than the surmises of counsel, for the better discovery of title. However, in all cases where the matter is stated by the bill as a fact on which the plaintiff founds his prayer for relief, it will be admitted in evidence, and will amount to proof of a confession:" *Lord Ferrers v. Shirley* (c). In *Woollett v. Roberts* (d), it was held, that a bill filed by a defendant could not be read against him, "*unless it were proved to have been exhibited with his privity.*" In *Greenleaf on Evidence* (e), after treating of admissions not conclusive, such as receipts

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(a) 1 Sid. 220.

(d) Ch. Ca. 64.

(b) Page 236.

(e) Sect. 212, p. 246.

(c) Fitz. 195, 7th edit.

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and mere acknowledgments, it is said:—"So of a bill in Chancery, which is evidence against the plaintiff of the admissions it contains, though very feeble evidence, so far as it may be taken as the suggestions of counsel." In Bacon's Abridgment, "Evidence," (F.) (a), the law is stated in almost the same terms as in Buller's *Nisi Prius*. In *Roe d. Lord Trimlestown v. Kemmis* (b), *Tindal*, C J., in answer to a question put to the Judges by the House of Lords, says, "The fifth exception, on the part of the plaintiff, relates to the bill in Chancery filed by the lessor of the plaintiff against the said Thomas Kemmis, on the 14th of October, 1816, which bill the defendant produced for the purpose of shewing the subject-matter of the suit, and that the lessor of the plaintiff claimed as heir-at-law of his father, the Lord Nicholas, and offered to read those allegations therein; but the plaintiff excepted to the production of the evidence, and we think it is a sufficient answer against the allowance of the exception, that the bill in Chancery, the production and reading of which is now excepted against, had in an earlier stage of the cause been put in evidence by the plaintiff himself; for the bill, having formed part of the evidence, the whole was in evidence, and the defendant might have insisted, at the time of its production by the plaintiff, that the whole should be read; and, in consideration and contemplation of law, the whole was read. The present exception, therefore, came too late. And we further think the exception, even if the objection already pointed out could be removed, is not pointed to the purpose for which alone it was produced, but is general against its being produceable for any purpose, even if any just objection could be made against its application for the purpose intended, of which we are not aware." *Doe d. Bowerman v. Sybourn* (c) will probably be relied on. There, in answer to the plaintiff's

(a) Vol. 3, p. 263, 7th edit. (b) 9 C. & F. 749. (c) 7 T. R. 2.

case in ejectment, the defendant set up a lease from one Pym, in 1789. It was objected, that it did not appear that Pym had the legal estate in him at the time, but that it was outstanding in his trustees; and, in support of the objection, the lessor of the plaintiff offered in evidence a bill in Chancery, filed in 1790 by the defendant, in conjunction with Pym, against the trustees, praying a conveyance of the legal estate to Pym. Lord *Kenyon* rejected it, and told the jury they might presume a legal conveyance; upon which the plaintiff was nonsuited. On motion to set aside the nonsuit, Lord *Kenyon* said, "A bill in Chancery is never admitted in evidence further than to shew that such a bill did exist, and that certain facts were in issue between the parties, and in order to let in the answer or depositions of the witnesses." That dictum, however, was unnecessary for the decision of the case, and was uttered on mere motion, and without reference to any authority. In *Warwick v. Foulkes* (a), which was an action for false imprisonment, the defendant pleaded the general issue and a justification, but his counsel at the trial abandoned the justification; and it was held, that the putting such a plea on the record was a circumstance which the jury might take into their consideration in the estimation of damages. [*Parke*, B.—That was a statement on the record in the same action.] It has never been doubted that an answer in Chancery is receivable in evidence against the party making it. [*Alderson*, B.—That is because the party on oath affirms it to be true.] Upon the same principle, the bill would be evidence if it appeared by any mode that the plaintiff admitted the statements contained in it. When his privity is shewn, the bill becomes primary evidence. [*Parke*, B.—No doubt the bill, if admissible at all, would be primary evidence.] Where, in an action by the assignees of a bankrupt, for seizing a

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(a) 12 M. & W. 507.

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ship, the plaintiffs, in order to prove the taking, produced an examination of the defendant before the commissioners under the fiat, in which the fact was admitted, and in which examination was set out an agreement between the bankrupt and the defendant, under which the latter claimed to be entitled to the possession of the ship, the Court held, that this agreement could not be rejected, though not otherwise proved, and though it was produced before the commissioners on the cross-examination of the defendant by his own attorney: *Goss v. Quinton* (a). In the *Fishmongers' Company v. Robertson* (b), *Tindal*, C. J., says: "Even if the contract put in suit by the corporation had been on their part executory, only not executed, we feel little doubt but that their suing upon the contract would amount to an admission on record by them, that such contract was duly entered into on their part, so as to be obligatory on themselves, and that such admission on the record would estop them from setting up, as an objection in a cross action, that it was not sealed with their common seal." *Brickell v. Hulse* (c) decided, that if a party, on motion before a judge, use the affidavit of another person, such affidavit is, on any subsequent occasion, admissible as evidence against him who so used it, even on a trial where the person who swore the affidavit is present in Court. In *Cole v. Hadley* (d), it was held, that, on an issue of "not possessed," in trespass quare clausum fregit, it was competent for the defendant to use the deposition of a witness formerly called by the plaintiff to prove his possession, in a proceeding before justices for an alleged trespass on the same close. So, where a petitioning creditor, having ascertained that his agent could prove an act of bankruptcy, sent for him for that purpose to be examined, on opening the fiat it was held,

(a) 4 Scott N. R. 471.

(b) 5 M. & G. 192.

(c) 7 A. & E. 454.

(d) 11 A. & E. 807.

that the deposition then made was evidence of the act of bankruptcy as against such creditor: *Gardner v. Moul*(a). If the plaintiff had sued on this agreement, and after plea had obtained a verdict and judgment, the record would have been conclusive evidence; and if so, it can make no difference that the proceedings are in another court. While the statements of a party, or his admission of a letter written by another, are receivable in evidence against him, upon what principle is a deliberate statement made in a court of equity, for the purpose of relief, to be excluded? [Parke, B.—The answers of the judges, in the *Banbury Peerage case* (b), are expressly in point.] There the plaintiff proposed to read in evidence a bill in equity, filed by one of his ancestors, and it was substantially the same as if he had sought to make his own bill evidence in his own favour. It is true that one of the questions put to the judges is, “whether any bill in Chancery can ever be received as evidence in a court of law, to prove any facts either alleged or denied in such bill?” But that must be understood to mean, can it be evidence on behalf of the person by whom it is filed?

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Shee, Serjt., and *Peacock*, in support of the rule.—A bill in equity is only evidence that a suit was depending between the parties, in which certain matters were in dispute, and not evidence of the facts stated in the bill: *Lord Ferrers v. Shirley* (c), *Doe d. Bowerman v. Sybourn* (d), *Banbury Peerage case* (b). The same principle applies to a bill in equity as to proceedings at common law. A declaration is not evidence against the plaintiff of the facts therein stated, nor is a plea evidence against the defendant; but those pleadings are simply evidence to shew the existence of a suit, and what was in issue between the

(a) 10 A. & E. 464.

(b) 2 Sel. N. P. 756, 10th edit.

(c) Fitz. 196.

(d) 7 T. R. 2.

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parties. In the ordinary case of an action for goods sold and delivered, with pleas of the general issue and payment, could the latter plea be taken as an admission that the goods were in fact sold? Suppose a plaintiff declared on a contract to pay 20*l.*, and at a future day deliver a horse, and assigned but one breach for non-payment of the money (the time for the delivery of the horse not having then arrived), to which the defendant pleaded payment, and obtained a verdict, if the plaintiff afterwards sued in respect of the non-delivery of the horse, and the defendant pleaded non assumpsit to that action, could the pleadings in the first action be given in evidence against the defendant as an admission of the contract? Or suppose a declaration containing two counts, the one on a contract by the defendant to pay 100*l.* two months after date, the other alleging, that, in consideration that the plaintiff would release the defendant from the first contract, he promised to pay the plaintiff 100*l.*; if the defendant should plead to the first count a release, and to the second non assumpsit, could the first plea be used as an admission of the second contract? If the statements in pleadings are equivalent to admissions in the presence of witnesses, they must be so for all purposes; and even if a plea were amended, the original plea would nevertheless be evidence against the defendant. But it is clear that admissions in one plea are no proof of the allegations contained in another: *Edmunds v. Groves* (a); *Smith v. Martin* (b); and if not evidence in the same cause, how can they be so in a different action? The passage cited from *Bac. Abr.*, "Evidence," (F.) (c), must be understood with reference to proceedings upon a bill previously filed and offered in evidence in another suit then before the Court. It proceeds thus:—"But where a bill is exhibited, and

(a) 3 M. & W. 642.

(b) 1 Dowl., N. S. 418.

(c) Vol. 3, p. 263, 7th edit.

there are no proceedings upon it, then it cannot be given in evidence, unless they prove a privity in the party; for a man may file a bill in another's name to rob him of his evidence by a sham confession; and therefore, a bill filed without any proceedings upon it, has not the force of an evidence; for no man can suppose that the party did himself file the bill; for the bill, without any proceedings to bring the adversary to answer it, is of no use to the party; and therefore, it must be supposed rather to be filed by a stranger, to do him an injury." In Starkie on Evidence (a) it is said, "A bill in equity is always evidence for the purpose of proving as a fact, that such a bill has been filed. But a bill in equity is not admissible, as it seems, in any case, even against the plaintiff himself, or those who claim through him, as to any facts alleged in the bill, even although they relate to matters of pedigree." In Gresley's "Evidence in Equity" it is said (b), "The statements in the bill may be ranked among admissions, though perhaps they are not quite properly so called. They are, in truth, the exposition of the case on which relief is sought, and to refer to them is exactly similar to using the argument *ex hypothesi* in logic." Again (c), "As for pleadings in equity, a bill is evidence of nothing whatever except the bare fact of such bill having been filed. It is often necessary that it should be proved, in order to let in the answer or depositions of the witnesses, and then to shew what facts were in issue. But of itself it does not even prove the existence of a suit,—'for it is no suit depending till the parties have appeared, or been served to appear, but only a piece of parchment thrown into the office, which may lie there for ever and never come to a suit' (d). Still less will it be received to prove the truth of its own assertions or denials, though it be of-

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(a) Vol. 1, p. 331, 3rd edit.

(b) Page 9, 2nd edit.

(c) Page 426.

(d) *Moor v. Welsh Copper Company*, 1 Eq. Ca. Abr. 39.

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ferred as nothing more than the declaration of an ancestor in a question of pedigree; for bills in equity are notoriously filled with fictitious matter. Neither is it allowed to be used against the plaintiff, the assertor of these false allegations, because it has been found by experience, that, under the present system of pleading, no process is so efficacious as alleging, in eventually eliciting the truth. The Court looks on these allegations as the mere suggestions of counsel, and connives at statements and charges being made, for the sole purpose of putting questions founded upon them to the defendant." In *Medcalfe v. Medcalfe* (a), Lord Hardwicke said, "At law the rule of evidence is, that a bill in Chancery ought not to be received in evidence, for it is taken to be the suggestions of counsel only; but in this Court it has been often allowed." There, however, the bill was read in the very same suit. [*Alderson*, B.—It might have been read for the purpose of limiting the proof, by shewing that certain evidence was inadmissible, because the party had not made a particular statement in his bill.] In *Kilbee v. Sneyd* (b), Lord Chancellor Hart refused to allow a bill to be read as evidence, saying, "The Court never reads a bill as evidence of the plaintiff's knowledge of a fact. It is mere pleader's matter. The statements of a bill are no more than the flourishes of a draughtsman." *Slatterie v. Pooley* (c), and *Howard v. Smith* (d), are cases in which the declarations of a party to a suit, in respect of a written document, were held to be evidence against him. But an admission by the defendant in an answer in Chancery, is merely secondary evidence of the execution of a deed, and therefore does not supersede the necessity of proving it by the subscribing witness: *Call v. Dunning* (e); 2 Stark. Evid. 25. In *Snow*

(a) 1 Atk. 63.

(b) 2 Molloy, 208.

(c) 6 M. & W. 664.

(d) 3 Scott N. R. 574.

(e) 4 East, 53.

d. *Lord Crawley v. Phillips* (a) the answer and other proceedings in the suit were admitted in evidence, as shewing the privity of the party in whose name the bill was filed. In *Roe d. Lord Trimlestown v. Kemmis* (b) the bill was produced by the defendant for the purpose of shewing the subject-matter of the suit, and that certain matters were in issue between the parties. In *Brickell v. Hulse* (c) the party had used the affidavit as a true statement, and therefore it was admitted as evidence against him. The Court there advert to the distinction between affidavits so used and depositions made in a suit in equity. [*Parke, B.*—The marginal note to that case is not quite correct (d). If a person uses an affidavit containing a hundred different statements, they cannot all be evidence against him. *Alderson, B.*—The decision itself is quite correct; and the marginal note should have been, “Where a sheriff, in a case of interpleader before a judge, puts in an affidavit of his officer, that the latter seized the goods, that is evidence as against a sheriff, that the officer did so seize.”] In *Gardner v. Moul* (e) the creditor sent his servant to prove a particular act of bankruptcy, and so made the deposition evidence against him of such act of bankruptcy. In *Cole v. Hadley* (f) it does not clearly appear upon what ground the evidence was held admissible. It may have been that the witness was the plaintiff’s agent, sent to lay the information.

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Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—This case was argued before my brothers *Alderson, Rolfe*, and *Platt*, and myself, on two days in the course of the sittings in and after Hilary Term, on shewing cause

(a) 1 Sid. 220.

(b) 9 C. & F. 749.

(c) 7 A. & E. 454.

(d) See 2 N. & P. 426.

(e) 10 A. & E. 464.

(f) 11 A. & E. 807.

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against a rule nisi to enter a verdict for the plaintiff, pursuant to leave reserved by Lord *Denman*. The action was for the use and occupation of the plaintiff's house for four years and a quarter, ending at Christmas, 1846. The defendant's answer was, that he had been let into possession on an agreement to purchase the plaintiff's leasehold interest for 630*l.*, and continued in such possession for some time. The defendant paid into court a sum sufficient to cover the compensation for the occupation from the end of that time till Christmas; and the question was, whether he was bound to pay the remainder. In order to discharge himself from the rent for this period, it was necessary for him to prove that there was an agreement to purchase, under which he entered. He had given notice to produce the agreement; and, though the plaintiff offered to produce it, he did not call for it, but he put in, as evidence of the agreement, the plaintiff's bill in Chancery, which had been filed to compel the defendant to perform it, and which of course stated the terms of it. The defendant had answered, and the cause had proceeded to a hearing. It was objected, that the statements in the bill were inadmissible as evidence against the plaintiff. Lord *Denman* received the bill as some evidence of the contract, reserving the point; and the question in the case is, whether the bill ought to have been received for that purpose. It was not doubted that, if it was to be received, it was *primary* evidence, on the principle of the case of *Slatterie v. Pooley*(*a*).

It is certain that a bill in Chancery is no evidence against the party in whose name it is filed, unless his privity to it is shewn. That was decided in *Woollett v. Roberts*(*b*), though no such decision was wanted. The proceedings on such a bill, after answer, tend to diminish the presumption that it might have been filed by a stranger, and appear to have been held sufficient to establish the

(*a*) 6 M. & W. 664.

(*b*) 1 Ch. Ca. 64.

privity of the party in whose name it was filed: *Snow d. Lord Crawley v. Phillips* (a). When that privity is established, there is no doubt that the bill is admissible to shew the fact that such a suit was instituted, and what the subject of it was; but the question is, whether the statements in it are any evidence against the plaintiff of their truth, on the footing of an admission. Upon this point the authorities are conflicting.

In the case referred to in *Siderfin*, it would seem that the bill, which was filed by the defendant to be relieved from a bond as simoniacal, was used against him to prove that he was simoniacally presented; but it does not very distinctly so appear.

In Buller's *Nisi Prius* (b) a bill in Chancery is said to be "evidence against the complainant, for the allegations of every man's bill shall be supposed to be true; and therefore, it amounts to a confession and admission of the truth of any fact; and if the counsel have mingled in it any fact that is not true, the party may have his action." And, after referring to the conflicting authority in *Fitzgibbon*, 196, the author of that Treatise on the Law of *Nisi Prius* (c) lays it down as a clear proposition, that where the matter is stated by the bill as a fact on which the plaintiff founds his claim for relief, it will be admitted in evidence, and will amount to proof of a confession.

These are the authorities in favour of the defendant. The recent case of *Lord Trimlestown v. Kemmis* (d), which was also mentioned, is not one in his favour, for the bill was there admitted to shew what the subject of the suit was, and to explain a subsequent agreement for a settlement between the parties.

On the other hand, in the above-mentioned case of *Lord*

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(a) 1 Sid. 220.

(b) Page 236.

(c) In the course of the argument *Parke*, B., stated, that the

Treatise was written by Lord *Bathurst*, though published in the name of Mr. Justice *Buller*.

(d) 9 C. & F. 749.

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Ferrers v. Shirley (a), a bill preferred by the defendant, stating the existence of a deed at that time, was objected to as proof of that fact, on the ground that it was no more than the surmise of counsel for the better discovery of the title; and the Court would not suffer it to be read. And Lord *Kenyon*, in *Doe d. Bowerman v. Sybourn* (b), where the distinction was insisted upon between facts stated by way of inducement, and those whereon the plaintiff founds his claim for relief, rejected that distinction, and pronounced his judgment, in which the Court acquiesced, that a bill in Chancery is never admitted farther than to shew that such a bill did exist, and that certain facts were in issue between the parties, in order to let in the answer or depositions. And it appears that in *Taylor v. Cole* (c) his Lordship held the same doctrine; with the exception, that a bill in Chancery by an ancestor was evidence to prove a family pedigree stated therein, in the same manner as an inscription on a tombstone, or an entry in a bible.

This exception also was disallowed by the opinion of the judges in the *Banbury Peerage case*, (reported in 2 Selwyn's *Nisi Prius*, 756, 10th ed., and correctly reported, for I have examined the books of the Committee of Privileges, 28th February and 30th May, 1809). The judges unanimously held, that a bill in equity was no proof of the facts thereon alleged, or as a declaration respecting pedigree; that it made no distinction that the bill was filed for relief. And, in answer to the question, whether any bill in Chancery can ever be received as evidence in a court of law, to prove any facts either alleged or denied in such bill, the judges gave their opinion, that, generally speaking, a bill in Chancery cannot be received as evidence to prove any fact alleged or denied in such bill. But, whether any possible case might be put which would form an excep-

(a) Fitz. 195.

(b) 7 T. R. 2.

(c) 7 T. R. 9, n.

tion to such general rule, the judges could not undertake to say. In the case of *Medcalfe v. Medcalfe*(a), Lord Chancellor *Hardwicke* held, that the rule of evidence at law was, that a bill in Chancery ought not to be received in evidence, for it is taken to be the suggestion of counsel only; but in the Court of Chancery it had been often allowed, and the bill was read. This distinction was afterwards repudiated in the case of *Kilbee v. Sneyd*(b), by Lord Chancellor *Hart*. When the defendant's counsel offered to read part of the bill, as proof of certain facts on which he rested part of his defence, the Lord Chancellor said, the Court never read a bill *as evidence* of the plaintiff's knowledge of a fact: "It is mere pleader's matter; the statements of a bill are no more than the flourishes of the draughtsman;" and that no decree was ever founded on the allegations of a plaintiff's bill, as evidence of facts; and he further said, that the statements of a bill are not evidence, and the Registrar could not enter any part of it on his notes as read.

In this state of the authorities directly bearing upon this question, there can be no doubt that the weight of them is against the reception of a bill in equity as an admission of the truth of any of the alleged facts. But it was argued, that there are many more recent authorities indirectly bearing upon this question, which afford a strong analogy in favour of the reception of a bill in equity as evidence in the nature of a confession. These are the cases of *Brickell v. Hulse*(c) and *Gardner v. Moult*(d). In the first of these, a party using an affidavit on a motion, in the second, by sending another to state a particular fact, was held to make the affidavit and statement respectively evidence against himself. These cases do not fall under the description of pleadings by parties; they are

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(a) 1 Atk. 63.

(b) 2 Molloy, 208.

(c) 7 A. & E. 454.

(d) 10 A. & E. 464.

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rather instances of admission by conduct, and are analogous to those in which the declarations of third persons are made evidence by the express reference of the party to them as being true. This is the explanation very rightly given in Mr. *Taylor's* recent Treatise on Evidence. In the first of the above-mentioned cases it may be presumed that the defendant prepared the affidavit, which he afterwards exhibited as true; at all events, that he exhibited it *for the purpose of proving a certain fact*. In the second, it must be taken that he sent the servant to prove *a particular act of bankruptcy*; for, if he sent him to be examined as a witness, and to give evidence generally as to any act to which the commissioner might examine him, there could be no reason for holding that his answers would be evidence against the party, any more than there would be for receiving the evidence of a witness examined by a party in an ordinary trial at law, as an implied admission by him, which, it is conceded, can never be done. (See Lord *Denman's* judgment in both the cases last cited). The case of *Cole v. Hadley* (a) was also referred to as an authority. From the short report of that case, it is not clear on what ground the evidence was received. It would seem that it was received as the deposition of a witness on a prior inquiry, between the same parties, on the same question. It could not be on the ground that the statement was evidence against the party, simply because the witness was produced by him, as the contrary was laid down in the two cases of *Brickell v. Hulse* and *Gardner v. Moulton*, which were referred to. These authorities, therefore, afford no reason for doubting the propriety of the decisions above referred to as to bills in equity. It would seem that those, as well as pleadings at common law, are not to be treated as positive allegations of the truth of the facts therein, for all purposes, but only as statements of the

(a) 11 A. & E. 807.

case of the party, to be admitted or denied by the opposite side, and if denied to be proved, and ultimately submitted for judicial decision.

The facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are evidence between them, and that conclusive, upon a different principle, and for the purpose of terminating litigation; and so are the material facts alleged by one party, which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, but only if the traverse is found against the party making it. But the statements of a party in a declaration or plea, though, for the purposes of the cause, he is bound by those that are material, and the evidence must be confined to them upon an issue, ought not, it should seem, to be treated as confessions of the truth of the facts stated.

Many cases were suggested in the argument before us, of the inconveniences and absurdities which would follow from their admission as evidence in other suits, of the truth of the facts stated. There is, however, we believe, no direct authority on this point. The dictum of Lord Chief Justice *Tindal*, in *The Fishmongers' Company v. Robinson* (a), which was referred to in argument, seems to be considered as amounting to a decision on this point; but it was unnecessary for the determination of that case. It is enough, however, to say, that, as to bills of equity, the weight of authority is clearly against their admissibility, for the only purpose for which they were material in the present case; and we are bound by that authority.

It becomes unnecessary to consider the other point argued before us. The rule must be absolute to enter a verdict for the larger sum, as the defendant cannot be allowed anything for repairs.

Rule absolute.

(a) 5 M. & G. 192.

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COUPLAND v. CHALLIS.

To an action for money had and received, the defendant pleaded, that the money was received by him and others, the provisional committee of a railway, as a deposit upon shares allotted to the plaintiff, who, with the defendant, the committee, and other subscribers, agreed to form a partnership for carrying on the undertaking. That, after the passing of the 9 & 10 Vict. c. 28, the provisional committee in pursuance of that act called a meeting, and an adjourned meeting of shareholders, for the purpose of determining whether the Company should be dissolved, and whether such dissolution should be taken to be an act of

ASSUMPSIT for money had and received by the defendant for the use of the plaintiff.

Plea.—As to 210*l.*, parcel &c., that, before the passing of the 9 & 10 Vict., intituled, “An Act to facilitate the Dissolution of certain Railway Companies,” the defendant and other persons caused a prospectus to be issued for the formation of a certain intended partnership, theretofore provisionally registered, for the making of a railway in England, to be called “The Direct Western Railway,” being a railway which could not be carried into execution without obtaining the authority of Parliament. That no act of Parliament had been obtained in respect of the said railway. That, in and by the prospectus, the defendant and divers persons therein mentioned, were stated and declared to be the provisional committee of the Company and it was thereby then also, amongst other things, stated and declared, that the capital of the Company should consist of and be 3,000,000*l.*, and should be divided into 120,000 shares of 25*l.* each; and that the allottees of the shares should pay a deposit of 2*l.* 12*s.* 6*d.* upon and in respect of each of the shares so allotted. That the defendant became, and, at the time of the dissolution of the Company, was, one of the members of the provisional committee, and intrusted with the management and carrying into effect of the said undertaking. That the plaintiff applied according to the prospectus, and became a subscriber for eighty shares in the Company, and the same were there

an act of bankruptcy, when the majority of votes were in favour of such dissolution, and against the same being taken to be an act of bankruptcy; and thereupon the dissolution of the Company became complete, and the carrying into effect of the undertaking finally ceased, and the affairs of the Company became liable to be wound up; that the sum sought to be recovered was part of the affairs of the Company to be so wound up; that they had not in any manner been wound up, nor had a reasonable time elapsed for the winding up of the same:—*Held*, on special demurrer, that the plea was bad, as amounting to the general issue.

upon then allotted to and taken by the plaintiff; and the plaintiff, in pursuance of the prospectus, then paid to the provisional committee of the Company, and the committee, and amongst others the defendant, then received from the plaintiff the deposit of 2*l.* 12*s.* 6*d.* per share upon the eighty shares of the plaintiff, amounting to the sum of 210*l.*; and thereupon, before the passing of the said statute, the plaintiff, the defendant, the committee, and divers, to wit, 5000 other persons, and who then also subscribed for and agreed to take, and did take, shares in the said Company, entered into an agreement together for the formation of the said intended partnership and the carrying into effect of the said undertaking. That the sum of 210*l.* in this plea mentioned, is the same sum of 210*l.* paid by the plaintiff as such deposit upon his shares in the Company; and that the same is sought to be recovered by reason of the scheme not having been prosecuted. That the provisional committee sent to the registrar of Joint-stock Companies a return, that the number of shares issued was 120,000, and the amount of deposits paid was 2*l.* 12*s.* 6*d.* on 13,030*l.*, part of the 120,000 shares issued, amounting to 340,203*l.* 15*s.*; also 1*l.* on account of 2*l.* 12*s.* 6*d.* on 4600 shares, other part of the 120,000 shares, amounting to 4600*l.* That no shares were issued as scrip and receipts other than the 1303 shares in the return specified. That, after the passing of the statute, the provisional committee called a meeting of the shareholders, for the purpose of determining whether the Company should be dissolved, and whether such dissolution, if resolved upon, should be taken to be an act of bankruptcy for the purpose in the statute mentioned. That notice was given by advertisement, specifying the day, hour, place, and purpose of meeting. That the meeting was duly held, and the defendant elected chairman, by a majority of the committee present. That the meeting then elected three shareholders to be scrutineers. That there were present, by themselves or their

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proxies, 500 persons, holding 2985 shares, issued as scrip and receipts, before the 31st March, 1846. That the chairman put to the meeting the two questions, whereof notice had been given, and the persons present and entitled to vote did vote, by each giving one vote in respect of each share held by him, which votes amounted to 2985*l*. That the votes were taken by the scrutineers, who declared in writing that 2845 of the votes were in favour of such dissolution, and against the same being taken to be an act of bankruptcy, and that 140 of the votes were neuter; and because the persons who voted did not represent one-third of the shares issued as scrip and receipts, the chairman caused the votes so taken to be recorded, and adjourned the meeting. The plea then alleged, in similar terms, notice of the adjourned meeting, which was duly held, and at which there were present, by themselves or their proxies, 500 persons holding 3795 shares, issued as scrip and receipts before the 31st of March, 1846, but being other than the shares in respect of which the votes had been given at the original meeting, which persons so present voted at the said adjourned meeting, and the votes so given amounted to 3795; that the votes were taken by the scrutineers, who then declared that 3785 were in favour of such dissolution, and against the same being taken to be such act of bankruptcy, and that 10 of the votes were neuter; that the total number of votes given at the original and adjourned meetings, in favour of such dissolution and against such bankruptcy, were 6630, being a majority of the votes of the whole scrip and receipts issued; that, at the said meetings, minutes of the proceedings were made and signed by the chairman, and countersigned by two of the scrutineers, and afterwards advertised; and thereupon the dissolution of the Company became and was completed and effected, according to the statute, and the carrying into effect of the undertaking thereupon then finally ceased to be proceeded with,

and was wholly given up and at an end; and thereupon, by force of the statute, the affairs of the Company became and were, and still are, liable to be wound up according to the rules applicable to the dissolution of partnership undertakings, as if the undertaking had been dissolved by the mutual consent of all the partners therein; and the said sum of 210*l.*, parcel &c., which, from the time of the payment thereof, has been, and still is, part of the capital and assets of the Company, subscribed for and to be used in and about the purposes of the undertaking if the same had been proceeded with, by reason of the premises then became and was, and still is, subject to the resolution for the dissolution of the Company, and the plaintiff's claim and demand in this action in respect thereof still is a part of the affairs of the Company to be so wound up; that, at the time of the commencement of the suit, the affairs of the Company had not been in any manner wound up, nor had a reasonable time then elapsed for the winding up of the same.—*Verification.*

Special demurrer, assigning for causes (amongst others), that the plea was an argumentative statement of facts which amount to the general issue.—*Joinder in demurrer.*

Hoggins argued, in support of the demurrer (December 7).—The facts stated in the plea shew that the sum sought to be recovered never was at any time money had and received by the defendant for the use of the plaintiff. The money was deposited with the defendant for partnership purposes; and he continued so to hold it until the shareholders resolved that the affairs of the Company should be wound up. As yet no account whatever has been taken.

Maynard, contrà.—The plea gives sufficient colour, if at any time the defendant held the money for the plaintiff's use. It is apparent that a right to recover it back accrued to the plaintiff, between the time of making the deposit and the resolution to dissolve the Company. The

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plea, therefore, confesses a cause of action at one time subsisting, and avoids it by matter *ex post facto*. There is an admitted failure of consideration, giving a colourable right to sue, which is taken away by the proceedings under the Winding-up Act, 9 & 10 Vict. c. 28; consequently, the plea is good upon the principle laid down by *Bayley, J.*, in *Carr v. Hinchcliff* (a). But, even supposing, that, between the time of payment and the resolution to dissolve the Company, there was, in point of fact, no interval in which the deposit became money received for the plaintiff's use, the plea would nevertheless be good, as giving implied colour: *Doctor Leyfield's case* (b). The defendant is not bound to shew expressly how this sum became money received for the plaintiff's use; but there is sufficient implied colour, if the facts alleged in the plea are not inconsistent with its having been so received. Whenever the facts charged in the declaration are admitted, and their legal operation is disputed by the matter alleged in the plea, the plaintiff has an implied colour of action. The plea of *liberum tenementum* has always been considered as giving implied colour, by admitting the fact of the plaintiff's possession, though it only does so by not denying matter inconsistent with it (c). In the case of *Owen v. Challis* (d), a similar plea to the present was demurred to, and the point is still under the consideration of the Court of Common Pleas.

Hoggins, in reply.—There is no confession of the cause of action. The declaration alleges that the defendant received the money for the plaintiff's use; the plea admits the receipt of it, but discloses facts amounting to a denial that it was ever received for the plaintiff's use. There is neither express nor implied colour, inasmuch as it does not distinctly appear that the scheme was ever abandoned;

(a) 4 B. & C. 551.

555, n. (b).

(b) 10 Rep. 88.

(d) 6 C. B. 116.

(c) 1 Chit. Plead. 7th edit.

and the facts stated shew that the promise implied by law never arose.

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PARKE, B.—As the case of *Owen v. Challis* appears to resemble this, we will consult the Court of Common Pleas respecting it.

Cur. adv. vult.

PARKE, B., now said.—In the case of *Coupland v. Challis* the question was, whether the plea amounted to the general issue. The same point arose in the Court of Common Pleas, in the case of *Owen v. Challis*, and they have decided that it does. There must, therefore, be judgment for the plaintiff. The defendant may amend on the usual terms, otherwise,

Judgment for the plaintiff.

THE NORTH BRITISH INSURANCE COMPANY v. RIKY.

July 11.

COVENANT.—The declaration stated, that, by an indenture made between the plaintiffs of the one part, and the defendant of the other part, (profert,) reciting that the defendant had effected a policy of assurance with the North British Insurance Company on his own life, bearing effect with the plaintiffs an insurance on his life, he paying the annual premium of 49*l.* 8*s.* 4*d.* on or before the 24th of June in each year, the defendant covenanted with the plaintiffs to pay them the premiums and all other sums of money that should become due in respect of the policy, at the proper times for that purpose, and to do every other matter or thing which should be necessary for keeping on foot the policy. First breach: that defendant did not pay the plaintiffs the premiums which became due in respect of the policy, according to his covenant; but, on the contrary, although afterwards, to wit, on the 24th of June, 1847, a premium of 49*l.* 8*s.* 4*d.* became due, yet the defendant did not then, or at any other time, pay it. Second breach: that the defendant did not do all such matters and things as were necessary for keeping on foot the policy, but, on the contrary, although afterwards, to wit, on the 24th of June, 1847, it was necessary, in order to keep the policy on foot, that an annual premium should be paid within twenty-one days from that day, yet the defendant did not, within that period, or at any other time, pay it:—*Held*, on special demurrer, that both breaches were bad.

A declaration in covenant stated, that, by indenture between the plaintiffs and defendant, reciting that the defendant had

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date on or about the 25th July, 1845, for assuring the sum of 2000*l.* to be paid to his executors, administrators, assigns, within three calendar months after proof of his decease, he or they paying the annual premium of 49*l.* 8*s.* 4*d.* on or before the 24th day of June in each year of his life and that the defendant had applied to the plaintiffs to lend him 1000*l.* at interest, which the plaintiffs had agreed to do, upon having the security therein mentioned, the defendant covenanted and agreed with the plaintiffs, that he should and would well and truly pay and cause to be paid to the plaintiffs the premiums and all other sums of money that should become due and payable in respect of the said policy, at the proper times for that purpose, and do every other act, matter, or thing, which should be requisite or necessary for keeping on foot the same. Averment: that although the said sum of 1000*l.* was unpaid, yet the defendant did not nor would, after the making of the said indenture, pay or cause to be paid to the plaintiffs the premiums which became due and payable in respect of the said policy, according to the form and effect of his said covenant in that behalf, but on the contrary thereof, although, after the making of the said indenture and before the commencement of this suit, to wit, on the 24th day of June, A.D. 1847, a certain premium, to wit, to the amount of 49*l.* 8*s.* 4*d.*, became and was due and payable in respect of the said policy, of which the defendant then had notice, yet the defendant did not nor would, then or at any other time, pay or cause to be paid the said premium. And the plaintiffs further say, that the defendant did not nor would, after the making of the said indenture, do all such matters or things as were necessary for keeping on foot the said policy, but on the contrary thereof, although after the making of the said indenture, and before the commencement of this suit, to wit, on the said 24th day of June, A.D. 1847, it became and was requisite and necessary, in order to keep the same policy on foot, that the an-

nual premium payable in respect thereof should be duly paid within twenty-one days from that day, of which the defendant then had notice, yet the defendant did not nor would, within the period last aforesaid, which had elapsed before the commencement of the suit, or at any other time, pay or cause to be paid the said premium; but the same was, and still is, wholly unpaid, contrary to the covenant of the defendant in that behalf.

Special demurrer, assigning for causes that the first breach does not correspond with the covenant, inasmuch as the covenant is, to pay the premiums at the proper times for that purpose; but it is not averred that the day mentioned was the proper time for such payment, or that the proper time had elapsed before the commencement of the suit.—That the last breach does not correspond with the covenant; for the covenant is, that the defendant should do every other matter or thing which should be requisite or necessary for keeping on foot the policy; but the breach does not shew any failure on the defendant's part to do any other or different act, matter, or thing than the payment of the premiums, but, on the contrary, it avers merely that the defendant failed to do something, as mentioned in the first breach, namely, the non-payment of premiums; that, if the last breach is to be considered a breach of the same covenant as the first breach, then the declaration is double, inasmuch as the first breach is for the non-payment of the said premium on the 24th of June; and the second breach is for the non-payment of the same premium within twenty-one days from that day.—Joinder in demurrer.

Lush argued in support of the demurrer (June 5).—The first breach is bad, on the grounds stated in the special demurrer. It ought either to have averred that the 24th of June was the proper time for payment of the premiums, or to have set out the policy, and so have shewn the proper time. The second breach is also bad, inasmuch as it

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does not correspond with the covenant. It merely alleges a default in payment of the premiums, and its effect is to raise matter of law for the determination of the jury; whereas it is for the Court to decide whether, upon the true construction of the policy, there has been a default in payment of the premiums at the proper time. Besides, both breaches are for the non-payment, at different times, of the same sum of money, which is manifestly inconsistent, and renders the declaration double.

Cowling, contra.—The first breach shews a default, by alleging that the defendant did not pay the premium “when it became due and payable.” That is a sufficient statement of the proper time for payment. The second breach is in respect of a different cause of action from the first, namely, that, although the premium was due on the 24th of June, and it became necessary that the defendant should pay it within twenty-one days afterwards, yet he had failed to do so. The declaration is not double; the covenant in the policy may be to pay on the day the premium was due, or within twenty-one days afterwards.

Lush replied.

POLLOCK, C. B.—The Court entertains no doubt that the first breach is bad: we will take time to consider the second.

Cur. adv. vult.

ROLFE, B. (after stating the pleadings) now said.—With respect to the first breach, we expressed our opinion at the time of the argument, and took time to consider the second. We are of opinion that the second breach is also bad, and that the defendant is entitled to judgment; the plaintiffs, however, may have liberty to amend on the usual terms.

Amendment accordingly.

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VAN CASTEEL and Others v. BOOKER and Others.

July 11.

TROVER for coffee.—Pleas, not guilty, and not possessed.

At the trial, before *Rolfe*, B., at the Liverpool Spring Assizes, 1848, it appeared that the defendants were the assignees of Barton, Irlam, & Higginson, of Liverpool, who had become bankrupt, and that the plaintiffs, who were merchants at Rotterdam, claimed the coffee in question, which was the cargo of the ship "Vigilant," as indorsees for value of the bill of lading, from A. W. Lyon, of Liverpool. A. W. Lyon traded as a commission merchant; he was correspondent of and agent for the house of Lyon, Schwind, & Co., at Rio de Janeiro, and was a partner in that house. In the month of September, 1847, Barton, Irlam, &

L., S., & Co., the correspondents at Rio of B. & Co., merchants at Liverpool, purchased a quantity of coffee, on their own credit principally, but in part with funds supplied by B. & Co. For the amount of the purchase on their credit, L., S., & Co. drew bills on B. & Co., and the coffee they shipped on

board a vessel of B. & Co., bound for "Cork and a market." An invoice was made out, stating the coffee to be shipped by order and on account and risk of B. & Co.; but L., S., & Co. procured the captain to sign bills of lading, making the coffee deliverable to their order or assigns, "freight free." One of these bills they indorsed in blank, and transmitted by post to B. & Co. on the 21st of September. At the end of September, A. W., the agent in England of L., S., & Co., asked the principal partner in the firm of B. & Co. to cause the bill of lading to be placed in third hands, to secure the bills drawn on account of the purchase, to which he agreed, and on the 16th of October gave a written order to that effect. On the 12th of November, which was after B. & Co. had committed an act of bankruptcy, the bill of lading arrived, and was, in pursuance of the above-mentioned agreement, delivered to A. W. for the above-mentioned purpose, who, after the fiat, pledged it for a large advance with the plaintiffs, merchants at Rotterdam. The cargo having afterwards arrived, the assignees got possession of it, and trover was brought by the plaintiffs, as indorsees of the bill of lading:—*Held*, that though the contract was *prima facie* made on behalf of the vendors, it was a question for the jury, looking at the form of the bill of lading and language of the invoice, &c., whether the goods were not really delivered on board, to be carried for and on account and at the risk of the bankrupts; and if they were, the right of stoppage in transitu, and also the power of rescinding by the bankrupts, so as to defeat the rights of their creditors, were both at an end; but if the jury should think, from the form of the bill of lading, that it was intended to preserve the rights of the unpaid vendors until some further act was done, by transferring the bill of lading, the right to stop the goods in transitu, and also the power of rescinding, would continue until the bill of lading, indorsed, reached the hands of the bankrupts; in which latter case it was competent for them to give the unpaid vendors a lien on the whole for the part not paid.

Held, also, that the plaintiffs had no title under the Factors Acts, inasmuch as they were not intrusted with the bill of lading as agents, by the true owners, but claimed to hold in their own right.

Also, that, in order to render a preference on the eve of bankruptcy valid, it is not necessary that there should be a threat or pressure, with an immediate power of rendering it available by taking legal steps. To defeat a payment or transfer made to a creditor, the assignees must shew it to be fraudulent as against the body of creditors, by proving it to be voluntary on the part of the bankrupt, and in contemplation of his bankruptcy; and if it is made in consequence of the act of the creditor, it is not voluntary.

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Higginson sent two vessels, the "Alice" and the "Vigilant," of which they were owners, to Rio de Janeiro for cargoes to be shipped by Lyon, Schwind & Co., on account of Barton, Irlam, & Higginson. The "Vigilant" was laden with coals belonging to Barton, Irlam, & Higginson, and consigned to Lyon, Schwind, & Co., who advanced the disbursements for the ship, sold the coals, and received the price. Partly with this money, but principally on their own credit, they procured 5090 bags of coffee, which they shipped on board the "Vigilant," and took from the master bills of lading dated the 21st September, 1847, at Rio de Janeiro, for 5090 bags of coffee, shipped by Lyon, Schwind, & Co. of Janeiro, on board the "Vigilant," bound "for Cork and a market," deliverable "to order or assigns, he or they paying freight free." The word "free" was in writing—the words "he or they paying freight," were in a printed form. An invoice was made out, stating the coffee to have been shipped by Lyon, Schwind, & Co. of Rio, on board the "Vigilant," bound for Cork and a market, "by order and for the account and risk of Barton, Irlam, & Higginson." On the back of this invoice, Lyon, Schwind, & Co. made out an account current between themselves and Barton, Irlam, & Higginson, in which they took credit for the amount of the disbursements for the ship, and the invoice price of the coffee, and debited themselves with the proceeds of the coals, and the amount of two bills drawn for the balance upon Barton, Irlam, & Higginson. One of these drafts was payable to the order of A. W. Lyon, the other to the order of Carruthers & Co.; and both were expressed to be "for value in account, which place to the account of coffee, per 'Vigilant,' as advised by Lyon, Schwind, & Co." Lyon, Schwind, & Co. indorsed one part of the bill of lading in blank, and on the 24th September sent it so indorsed, together with the invoice and account current, by post, in a letter addressed to Barton, Irlam, & Higginson.

The principal partner in the firm of Barton, Irlam, & Higginson was Jonathan Higginson, who resided at Liverpool, and managed the business of the house there. The firm, which had been established many years, and had traded to an immense extent, from time to time obtained advances from their bankers, the Royal Bank of Liverpool. In the beginning of the year 1847, the balance due to the Royal Bank amounted to nearly half a million; and the manager and directors becoming alarmed, pressed J. Higginson for security, or that he should reduce the balance. Some angry discussions having in consequence taken place, on the 23rd of September the directors of the Royal Bank passed a formal resolution, that, unless the balance then due to the Bank, amounting to 460,000*l.* and upwards, was secured or paid, proceedings should be taken against the sureties of Messrs. Barton, Irlam, & Higginson; and they forwarded a copy of this resolution to J. Higginson.

The resolution was intended to be strictly secret, but by a private channel it became known to A. W. Lyon about the end of September. He in consequence sent to the office of J. Higginson a note, of which no copy was kept, and which could not be found amongst the bankrupt's papers. J. Higginson, who was at that time absent from Liverpool, wrote in answer, requesting A. W. Lyon to visit him at his shooting lodge, at Huyton. On the 7th of October A. W. Lyon went there, and one Parsons, the managing clerk of Barton, Irlam, & Higginson was also there. On the 8th, some conversation took place between J. Higginson and A. W. Lyon, in the presence of Parsons, the nature and effect of which was the chief disputed fact at the trial. The plaintiffs' case was, that this conversation amounted to a demand, on the part of A. W. Lyon, that the bills of lading of the expected cargoes of the "Alice" and "Vigilant" should on their arrival be placed in the hands of a third party, as a security for the bills expected to be, and which,

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as above stated, were in fact drawn against those cargoes, and a promise by Higginson that this should be done. The defendants maintained that it was no more than some vague statements on the part of J. Higginson; that A. W. Lyon need not be uneasy about the drafts, as he would take care that the proceeds of the cargoes were applied to honouring them. Nothing was done at the time, and A. W. Lyon returned to Liverpool on the 10th. On the 16th of October J. Higginson arrived in Liverpool, and on his arrival received a letter from the directors of the Royal Bank, in plain terms telling him, that, unless he secured the debt due to them, the firm should be made bankrupt. J. Higginson on the same morning caused his clerk to draw out a letter addressed to Mr. Haynes Higginson, his brother, (who was not concerned in the house of Barton, Irlam, & Higginson,) in the following terms:—

“Liverpool, October 16, 1847.

“Dear Sir,—According to arrangement with Mr. A. W. Lyon, we request that you will hold to his order the bills of lading that have to come forward for the cargoes per ‘Alice’ and ‘Vigilant,’ (which vessels will be laden on our account by Messrs. Lyon, Schwind, & Co., of Rio,) until the drafts drawn and to be drawn against said cargoes are paid.

“We remain, dear Sir,

“Your most obedient servants,

“BARTON, IRLAM, & HIGGINSON.”

J. Higginson signed this letter in the name of the firm, sent for A. W. Lyon and Haynes Higginson, and in the presence of the former handed the letter to Haynes Higginson. At the same time, he handed a similar letter to Haynes Higginson, relating to some other cargoes in favour of another house; and he also gave A. W. Lyon the bills of lading of some other cargoes as security for bills of exchange which had been drawn by another correspondent,

and were then running. These transactions, if valid, disposed of all the available property of Barton, Irlam, & Higginson.

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On the 21st of October the partners in that firm were served with an affidavit of debt, on the part of the Royal Bank, under the 1 & 2 Vict. c. 110, and on the 13th of November a fiat issued against the firm, which owed upwards of 900,000*l.*, and had no assets except the equity of redemption of some mortgaged estates, and the property disposed of on the 16th of October.

On the 12th of November, being the day after the act of bankruptcy was complete, the above-mentioned letter from Lyon, Schwind, & Co., to Barton, Irlam, & Higginson, containing the bill of lading indorsed in blank, the invoice, and account current, arrived by post. The bill of lading was on the same day handed to A. W. Lyon, by Haynes Higginson. A clerk was sent on the same day to Cork, with instructions from Barton, Irlam, & Higginson, and also from A. W. Lyon, to order the "Vigilant" to Rotterdam. A. W. Lyon then entered into an arrangement with the plaintiffs, by which he was to consign the coffee to them at Rotterdam, and they were to make him advances on the consignments. He indorsed the bill of lading by writing his own name under the indorsement of Lyon, Schwind, & Co., and on the 16th of November forwarded it to the plaintiffs, and received about 5000*l.* in advance upon it. This was, on the plaintiffs' part, a perfectly fair transaction, and entered into by them without the slightest knowledge of the circumstances under which the bill of lading came to the hands of A. W. Lyon. The drafts having become due, A. W. Lyon paid part of them, for the honour of the drawers.

The "Vigilant" sailed on the 27th of September. She was prevented by stress of weather from going to Cork for orders, and on the 30th of November put into Liverpool. The captain, who was ignorant of the bankruptcy of Barton,

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Irlam, & Higginson, went on shore to report his arrival at their counting-house, and found it closed. On his return he found a messenger in possession of the ship and cargo, and was immediately after served with two notices, one from the plaintiffs, claiming the cargo as indorsees of the bill of lading, and another from A. W. Lyon, claiming to stop the goods in transitu, on behalf of Lyon, Schwind, & Co., as unpaid vendors.

On the part of the plaintiffs it was contended, first, that A. W. Lyon had a right to stop the goods in transitu; secondly, that the delivery of the letter of the 16th of October, 1847, was not a fraudulent preference, but merely the fulfilment of a binding agreement made at the time of the above-mentioned conversation between J. Higginson and A. W. Lyon at Huyton; thirdly, that, under the Factors Acts, A. W. Lyon had a right to pledge the bill of lading for the advances made upon it. The defendants' counsel contended, that the delivery of the letter was a voluntary act done for the purpose of favouring A. W. Lyon, or rather, to prevent the Royal Bank from gaining any advantage from their making the firm of Barton, Irlam, & Higginson bankrupt. They also argued, that, at all events, the plaintiffs could not maintain trover, as the agreement merely gave Lyon a personal lien until the drafts were paid, and conferred no authority to pledge the bill of lading.

The learned judge told the jury that there could be no right to stop the goods in transitu, because the delivery on board the consignees' own ship amounted to a taking possession, and if not, the seizure by the messenger did; that the Factors Acts did not apply, as Lyon was not a person intrusted with the bill of lading as factor or agent, but held it in his own right; that the plaintiffs' title depended upon whether or no the delivery of the letter of the 16th of October was a fraudulent preference; and that, in point of law, it was a fraudulent preference, unless the bankrupt J. Higginson was actuated by fear, that, unless

he delivered it, he would be subject to proceedings. The jury having found for the defendants,

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The *Attorney-General* (April 20) moved for a new trial, on the ground of misdirection.—First: the learned judge was wrong in telling the jury that there was no right of stoppage in transitu. Although the coffee was shipped on board the vessel of Barton, Irlam, & Higginson, yet the consignors, Lyon, Schwind, & Co., had received bills of lading making the coffee deliverable “to order or assigns;” Barton, Irlam, & Higginson, for the purpose of this transaction, were mere carriers, and the transitus would continue until the goods arrived at their destination under the bill of lading, viz. “Cork and a market.” [*Parke, B.*—In the recent case of *Wait v. Barker (a)*, where goods were shipped under a bill of lading, making them deliverable to the consignor’s order, we thought that the property did not vest until the indorsed bill of lading was accepted by the consignee. Now in this case, if the property did not vest in Barton, Irlam, & Higginson, would they not have a right to repudiate the contract? They might; and such repudiation would be good as against the assignees, even though voluntary and in contemplation of bankruptcy: *Atkin v. Barwick (b)*, *Dixon v. Baldwin (c)*. Secondly: the ruling of the learned judge, upon the question of fraudulent preference, conflicts with many decided cases. It is not necessary that the creditor, when he makes the application, should be in a condition to enforce any remedy against the debtor: it is not even requisite that the debt should be due; it may be a *debitum in presenti solvendum in futuro*. [*Pollock, C. B.*—That was decided in *Crosby v. Crouch (d)*. *Rolfe, B.*—I do not think that I so expressed myself as to leave the jury to suppose that the bankrupt

(a) 2 Exch. 1.

(c) 5 East, 175.

(b) 1 Str. 165.

(d) 11 East, 256; 2 Camb. 166.

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must have been actuated by fear of *immediate* legal proceedings. What I meant to put to them was, did he do it in order to favour Lyon, or did he do it under the fear of proceedings against himself?] There need not be any direct consequences operating in the bankrupt's mind: *Bel v. Prittie* (a), *Mogg v. Baker* (b). [Pollock, C. B.—Any act of urgency—in short, any act or threat of any sort, which prevents the bankrupt from being purely a free agent, will suffice. Parke, B.—If the jury believe that the request had no effect on the bankrupt's mind, and that he meant to give a fraudulent preference, and defeat the distribution of his property under the bankrupt laws, the circumstance of there having been a demand goes for nothing. But if the moving cause was the solicitation of the applicant, and not the desire of the bankrupt himself to defeat the general distribution of his property, according to the cases that is no fraudulent preference.] Thirdly: the plaintiffs, as innocent indorsers of the bill of lading, have a good title under the Fact Acts, 6 Geo. 4, c. 94, and 5 & 6 Vict. c. 39. [Parke, B.—To bring the case within those acts, Lyon must have been intrusted with the bill of lading by the true proprietor, and he must have been intrusted with it in the character of agent. Now, suppose the property in the goods vested in Barton, Irlam, & Higginson at the time they were shipped, Lyon was not their agent intrusted with the bill of lading, but a person holding it on his own account. Barton, Irlam, & Higginson had no property in the goods, then the question of fraudulent preference does not arise. The case will mainly turn upon the effect of the delivery on board the bankrupt's own ship, but under a bill of lading, making the goods deliverable to the shipper's order.]

A rule nisi having been granted,

(a) 10 Bing. 408.

(b) 4 M. & W. 348.

Martin, Crompton, and Corrie, shewed cause (June 27).—

First, it has been suggested that the case falls within the authority of *Atkin v. Barwick* (a), and *Dixon v. Baldwin* (b), and that the bankrupts had a right to repudiate the contract and return the goods. Those cases, however, only shew that an insolvent purchaser may, before delivery, rescind the contract in toto; but he cannot, as here, take to the property and make a new contract in respect of it. This transaction with Lyon could have no effect except by way of a new contract. Lyon, Schwind, & Co., bought at Rio, as the agents of Barton, Irlam, & Higginson, and partly with their money, certain goods which were shipped on board their ships sent for that purpose, and the invoice stated that the goods were shipped by their order, and on their account, and at their risk. It is difficult to imagine a more complete delivery. [*Parke, B.*—A delivery on board a purchaser's ship is in general a delivery to him; but according to the decision of this Court, in *Wait v. Baker* (c), where goods are shipped under a bill of lading making them deliverable to the shipper's own order, the property does not vest in the consignee until the bill of lading has been delivered to and accepted by him.] The fact of the consignors indorsing the bill of lading in blank and sending it to the bankrupts, shews that the former never intended to take any precaution against the property vesting in the latter. [*Parke, B.*, referred to *Mitchell v. Ede* (d).] The general rule is, that if goods are shipped on board a chartered vessel, the property vests in the consignee, subject to the right of stoppage in transitu; but if the goods are placed on board the purchaser's own ship, that is an absolute delivery—the same as if placed in his cart. The shipper may, however, protect himself by taking a bill of lading, making the goods deliverable to his own

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(a) 1 Str. 165.

(b) 5 East, 175.

(c) 2 Exch. 1.

(d) 11 A. & E. 888.

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order only; but in that case the property would pass as soon as he indorsed the bill of lading generally. Here no precaution was taken to prevent the transitus of the property; the goods were delivered under a bill of lading in terms enabling the party to negotiate it. [*Parke, B.*—After the bill of lading was forwarded, but before it arrived, was it not competent for the vendees to rescind the contract, and deliver up the goods to the agent of the vendors?] Though they might altogether rescind the contract, they could not, as here, take the property and give a security upon it. The letter of the 16th October is no rescission of the contract, but an agreement that Lyon should have a lien on the cargoes until the drafts were paid. If the goods should fetch more than the amount of the drafts, Barton, Irlam, & Higginson were to have the surplus; if the goods produced less, Lyon would have a claim against Barton, Irlam, & Higginson for the deficiency. Instead of rescinding the contract, the parties affirm it, and make it the basis of a new contract. *Smith v. Field* (a) is a distinct authority, that to bring a transaction within *Atkin v. Barwick* (b) there must be a complete rescission of the contract. There the insolvent Dewhurst was desirous of returning the goods to the consignor, but the latter thought to better his position by attaching them. Lord Kenyon says: "*Salte v. Field* (c), as well as *Atkin v. Barwick*, proceeded on the ground of a renunciation of the contract by all the parties concerned. But in this case, that circumstance, which differs it from others, is wanting. On the 18th of May, Dewhurst's letter was communicated to the plaintiffs, and his situation was explained to them, but they declined rescinding the contract of sale, not indeed in words, but by an act incapable of being explained away; for on the next day they instituted a proceeding in the Sheriff's Court by way of attachment, in which they

(a) 5 T. R. 402.

(b) 1 Str. 165.

(c) 5 T. R. 211.

made an affidavit that Dewhurst was indebted to them for these goods; and they attached the goods as his property. When the offer was made to them by Dewhurst they might have rescinded the contract, but they declined doing it, and they treated it as a subsisting contract;" and *Ashurst, J.*, says: "Here the vendee was desirous of rescinding the contract, but the vendors, whether by mistake of the law, or for what other reason it is not necessary to inquire, would not consent, but on the contrary affirmed the contract, and considered the goods as the property of the bankrupt." So here there is an affirmance of the contract, and an attempt to give new rights. In *Siffken v. Wray* (a) the bankrupt handed over the bills of lading to an agent of the consignor, under a written agreement that he should apply the proceeds of the goods to payment of the bills drawn against them, and that new contract was held void as against the assignees, because it was after an act of bankruptcy. [*Parke, B.*—In *Smith v. Field* there was an offer to rescind the contract, which offer the insolvent at the time had a right to make, but which was not accepted; therefore the contract was not rescinded, and the goods passed to the assignees. In this case it is important to consider whether Lyon could have stopped the goods in transitu, because if he had the power, instead of exercising it he made a contract to have the goods.] There can be no right of stoppage in transitu, unless the goods are in the possession of a third party, for the purpose of carriage. Goods delivered on board the vendee's ship cannot be subject to such a right, for the property vests absolutely in him by the delivery: *In re Humberston* (b), *Ogle v. Atkinson* (c). The bills of lading make no difference as between the parties; they are nothing more than the master's receipt of the goods. It is true that, in *Lickbarrow v. Mason* (d), it was held that the right of

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(a) 6 East, 371.

(b) 1 De Gex, 263.

(c) 1 Marsh, 323; 5 Taunt. 759.

(d) 2 T. R. 63.

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the consignor was divested, as against the assignee of a bill of lading for a valuable consideration; but here the bill of lading was indorsed in blank, and sent by post to the consignees, and from that moment the vendors ceased to have any control over the goods. There was nothing to prevent the vendees from carrying the goods at once to any market they thought fit. Besides, it is impossible to tell what portion of the goods are the proceeds of the bankrupt's money. [*Parke, B.*—Though a vendor of goods may have been paid part of the price, he has all the rights of an unpaid vendor until the whole has been paid. Suppose *Lyon, Schwind, & Co.*, after the goods were shipped, and whilst they held the bills of lading, had sold these goods, would they have been liable to an action? There was a case of *Ellershaw v. Magniac* decided in this court, which is in point, but is not reported.] [*Martin* said he had been counsel in that case. It was one in which a merchant at *Odessa* had shipped, by order, a quantity of corn on board a ship bound to *England*, doubtless meaning at the time to send it in fulfilment of the order which he had received from a person who was not the owner of the ship. Whilst the ship was yet in the harbour, and before the master had signed any bill of lading, and before the shipper had made out any invoice, he received information which induced him to change the destination. *Parke, B.*—This Court, including the late Lord *Abinger*, thought he had a right to vary the consignment.] In that case the consignor had done no act indicating an intention to vest the property in the consignee. But where goods are shipped on board the vessel of the consignee, sent for that purpose, on his account and risk, the property vests, and the shipper cannot alter their destination. In *Walley v. Montgomery* (a) goods were shipped by order of the plaintiff, by *Schumann & Co.*, under a bill of lading making them

(a) 3 East, 585.

deliverable to the shipper's order, and the plaintiff brought trover and was nonsuited; but, on motion for a new trial, it being pointed out that a bill of lading indorsed by Schumann & Co. in blank, and an invoice, had been transmitted to the plaintiff, Lord *Ellenborough* said, "I think the invoice vested the property in the plaintiff; for if there had been a loss at sea, that loss must have been borne by him." And *Grose, J.*, says, "The property of the goods was once in Schumann & Co., but by the bill of lading and invoice sent to the plaintiff, and the delivery to the captain, the property passed from them to the plaintiff, to every purpose except as to the right of stoppage in transitu." So in *Coxe v. Harden* (a), where the plaintiff was the indorsee of a bill of lading of goods shipped by Brown & Co., deliverable to their order, and the defendant claimed under Oddy & Co., for whom the goods were purchased by their orders, and shipped for their use and at their risk, Lord *Ellenborough* says, "The goods which were shipped by the orders and at the risk of Oddy & Co. became their property, subject only to the shipper's right of stoppage while in transitu; which right not having been exercised during that period, the goods, on delivery, became the indefeasible property of Oddy & Co., and they were entitled to transfer their right in them to the defendants." The principle of those decisions is adopted by Lord *Tenterden* in his Treatise on Shipping (b). In this case no attempt was made to stop the goods in transitu until after the messenger was in possession. [They also referred to *Newson v. Thornton* (c).]

Then, with respect to the Factors Acts:—This is not the case of a pledge by a person intrusted with the document as factor or agent, but holding it in his own right. [*Parke, B.*—The 6 Geo. 4, c. 94, s. 2, uses the word "person," not "agent."] The statute has been construed to apply only to

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(a) 4 East, 211. (b) Pages, 517—536, 8th edit. (c) 6 East, 17.

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persons intrusted with documents as factors or agents. *Jenkyns v. Usborne* (a). At all events, the plaintiffs have not such a right of property as would enable them to maintain trover. The agreement merely gave a personal lien on the bills of lading until the drafts were paid. It is clear that at common law, if a person who has a mere personal lien abuses it by pledging the goods, no proper lien passes to the pledgee: *M'Combie v. Davies* (b), *Daubigny Duval* (c).

Then, with respect to the question of fraudulent preference: the summing up of the learned judge was in accordance with that in *Cook v. Rogers* (d), where *Tindal, C. J.* told the jury to consider whether the payment was made voluntarily or in consequence of any threat from the creditor. [*Parke, B.—Mogg v. Baker* (e) decided that it is not necessary that there should have been any pressure on the part of the creditor, or apprehension on the part of the insolvent, that he would be in a worse condition by not making the payment. *Rolfe, B.—*If the law be, that anything in the nature of a request which emanates from the creditor is sufficient, then my ruling was incorrect, for it was calculated to convey the impression that there would be a fraudulent preference unless payment was demanded with importunity and pressure, not requested as a matter of favour.] It is a question for the jury to consider whether the payment was made *bonâ fide* and in consequence of the request, or voluntarily and in fraud of the body of creditors: *Cook v. Pritchard* (f). The rule of law which forbids a trader on the eve of bankruptcy to prefer a particular creditor, conflicts with another rule, namely, that the law favours a diligent creditor. Although therefore, it is the duty of the trader, so far as his voluntary act is concerned, to take care that his property is

(a) 7 M. & G. 678.

(b) 7 East, 5.

(c) 5 T. R. 604.

(d) 7 Bing. 439.

(e) 4 M. & W. 348.

(f) 5 M. & G. 329.

equally distributed amongst his creditors, it is still competent for a particular creditor to demand payment of his debt, and the payment made in consequence of such demand is valid: 1 Deacon's Bankrupt Law, p. 446; *Morgan v. Brundrett* (a). [*Parke, B.*, referred to *Aldred v. Constable* (b).]

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The *Attorney General* (*Watson, J. Henderson, and Atherton* with him), in support of the rule.—It is conceded that a delivery on board the vendee's ship, when unexplained, is a delivery to the vendee; but the bill of lading is the written contract, and is conclusive to prove with what intent the goods were delivered. *Bohtlingk v. Inglis* (c) shews that it would have made no difference if the freight had been payable by the consignees. Neither is the case altered by the bill of lading containing the words "freight free," for that is a contract made by the master without the authority of the ship-owner, and the latter may recover the freight on a quantum meruit: per *Mansfield, C. J.*, in *Dewell v. Moxon* (d). At what period did the delivery operate? Certainly not at the time of posting the letter containing the indorsed bill of lading: *Alderson v. Temple* (e). If the mere parting with the control of a bill of lading vested the property in the consignee, there never could be any stoppage in transitu. Although the consignors acquired new rights under the agreement, they are only in the same situation as unpaid vendors who had stopped in transitu. The better opinion now is, that the effect of a stoppage in transitu is not to rescind the contract, but only to place the vendor in the same position as if he had not parted with the possession of the goods: *Wentworth v. Outhwaite* (f). [He was then stopped by the Court.]

(a) 5 B. & Ad. 289.

(b) 4 Q. B. 674.

(c) 3 East, 381.

(d) 1 Taunt. 391.

(e) 4 Burr. 2235.

(f) 10 M. & W. 436.

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PARKE, B.—We are all of opinion that there must be a new trial, the question of fraudulent preference not having been correctly submitted to the jury. We will, however, give a judgment in writing, explaining our views of the important questions of commercial law which have been so fully argued before us, so as to prevent the necessity of an appeal (at least to this Court) on the questions of law likely to arise at the trial.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—In this case the Court have already intimated their opinion that the rule must be absolute for a new trial, on the ground that the law as to a fraudulent preference of a particular creditor had been laid down by my Brother *Rolfe* so as to operate too favourably for the defendants, the assignees of the bankrupts, inasmuch as his statement of the law was likely to lead to the inference, that, to render a preference on the eve of bankruptcy valid, a threat or pressure, with an immediate power of rendering it available by taking legal steps, was necessary. This is certainly not so; for a surety for the bankrupt, or one to whom a debt is due, but not payable, may obtain a valid preference though he has no present power of proceeding against the bankrupt. To defeat a payment or transfer made to a creditor, the assignees must shew it to be fraudulent as against the body of creditors entitled under the fiat, by proving it to be voluntary on the part of the bankrupt, and in contemplation of his bankruptcy; and if it is made in consequence of the act of the creditor, it is not voluntary.

On the new trial further questions may arise, which were much discussed before us. Lyon, Schwind, & Co., the correspondents of the bankrupts at Rio, purchased a large quantity of coffee on their own credit principally, but in

part with funds supplied by the bankrupts, by the sale in the Brazils of a cargo of coals. For the amount of the purchase on their credit they drew bills on the bankrupts, and the coffee they shipped on board a vessel of the bankrupts at Rio, on the 21st of September. An invoice was made out stating the coffee to be shipped on account and risk of the bankrupts, and transmitted to them; but Lyon, Schwind, & Co. procured the captain of the ship to sign bills of lading, making the coffee deliverable to their order or assigns, stating the goods to be freight free. One of these bills they indorsed in blank, and transmitted by post to the bankrupts on the same 21st of September. It arrived in Liverpool on the 12th of November, at which time the bankrupts had committed an act of bankruptcy. At the end of September A. W. Lyon, the agent in England of Lyon, Schwind, & Co., asked one of the bankrupts, the principal partner, to cause the bill of lading to be placed in third hands to secure the bills drawn on account of the purchase, to which he agreed. On the 16th of October the bankrupt gave a written order to that effect, and on the 12th of November, after the act of bankruptcy (which was on the 11th), the bills of lading arrived, and were, in pursuance of the above mentioned agreement, delivered to Lyon for the above mentioned purpose, who afterwards pledged them for a large advance with the plaintiffs, merchants at Rotterdam. The cargo having afterwards arrived, the assignees got possession of it; and an action of trover was brought by the plaintiffs, the indorsees of the bills of lading.

Some questions arising upon the facts of which an outline has been given, it may be necessary to determine on the new trial, besides the question of fraudulent preference, to which the attention of the Court and jury was chiefly directed upon the last trial.

The principal questions are, whether Lyon, Schwind, & Co. had a right of stoppage in transitu when the agreement

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of A. W. Lyon with the bankrupts took place; or whether it was then competent to the bankrupts, though voluntary and in contemplation of bankruptcy, to rescind the contract of purchase, as being still *unexecuted* by actual or constructive delivery, on the principle on which the case of *Atkins v. Barwick* was supported, and on which many subsequent cases have proceeded.

The answer to these questions depends upon one fact, whether the coffee was put on board to be carried for and on the account and risk of the bankrupts or not. If it was, the delivery on board put an end to the right of stopping in transitu, for the delivery on the vendee's own ship is a final delivery at the place of destination, especially where, as in this case, its final port of discharge was not then determined, and it required further orders at Cork to give the vessel its destination. On that supposition the goods were at their journey's end; for, to adopt the definition of Mr. Paley (Principal and Agent, 352), it was not intended necessarily that they should ever come otherwise into the possession of the buyer than by being in that of the agent for carrying, the master. Now, whether they were delivered on board to be carried for the vendee, (for no doubt Lyon, Schwind, & Co. have the rights of vendors, and may consider the bankrupts as their vendees) depends very much on the form of the bill of lading. We had to consider that question in the case of *Ellershaw v. Magniac* (a), unfortunately not reported, and lately in that of *Wait v. Baker*, in which case the fact of making the bill of lading deliverable to the order of the consignor was properly held decisive to shew that no property passed to the consignee, it being clearly intended by the consignor to preserve his title to the goods until he did a further act. The contract for carriage, which the bill of lading is, is made expressly with the consignor, and he no doubt

(a) 22nd April, 1843.

might sue upon it, though in making it he was really acting as agent of and for the consignee. But if he made it as agent for and on behalf of the consignee, the consignee also, as being the real principal, might sue, if there had been a breach of the contract to carry. Notwithstanding the form of the bill of lading, therefore, the contract may have been really made on behalf of the vendee, though *prima facie* it is made on behalf of the vendor; and it is a question for the jury, to be decided on the evidence, looking at the form of the bill of lading, particularly noticing that it is made *freight free*, and the language of the invoice, and the immediate transfer of the bill of lading to the bankrupts, and other facts, whether the goods were not *really* delivered on board to be carried for and on account and at the risk of the bankrupts. If they were, they had arrived at their journey's end when they were delivered on board, and the right of stopping in transitu, and also the power of rescinding by the bankrupts, so as to defeat the rights of their creditors, were both at an end.

But if the jury should think, from the form of the bill of lading, that it was intended to preserve the right of the unpaid vendors, until some further act was done by transferring the bill of lading, (in which case the vendors alone could have sued for any breach of the contract to carry and deliver the goods,) the right to stop the goods in transitu, and also the power of rescinding, would continue till the bill of lading, indorsed, reached the hands of the bankrupt. In the latter case, as it was competent to the bankrupts to have rescinded the contract altogether, and placed Lyon, Schwind, & Co. in their original position, by giving back the goods, we think it was competent also to them to make the agreement which they did make, namely, to place them in the situation of vendors to whom the whole price had not been paid, and give them a lien on the whole for the part not paid.

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Two other points remain to be considered. If the jury should be of opinion that the delivery at Rio was final, and therefore that there was no right of stoppage in transitu, nor rescinding the contract, it may be that the agent of Lyon, Schwind, & Co. supposed that the rights existed, or that they were fairly disputable; and it may be that the bankrupts, or rather the bankrupt who agreed to return the bills of lading to A. W. Lyon, so supposed. Either of these circumstances would materially influence the decision of the question, whether that transaction was a fraudulent preference or not, and ought to be submitted to the jury.

Another question also, supposing all these points to be decided for the plaintiffs, was raised for the defendants, namely, that the transfer of the bills of lading did not authorise A. W. Lyon to pledge them with the plaintiffs, so as to give a title to them, even for a valuable consideration. This will be for the decision of the jury, and depend upon their view of the agreement to place the bills of lading in Lyon's hands, whether it was meant to be a mere deposit or pledge, to be kept in his hands, or it was intended that he should transfer them in order to raise money for the payment of the bills.

All these questions, which we have stated at length in order to a final decision of this case, which is of so much importance to the parties, in a pecuniary point of view, must be left to the jury.

Rule absolute.

The cause was again tried at the Summer Assizes, 1848, before *Erle, J.*, who left the several questions to the jury, in accordance with the above judgment. The defendants' counsel tendered a bill of exceptions; but the jury having found for the defendants on the question, whether the goods were delivered on board for and on account and at the risk of the bankrupts, and also on the question of fraudu-

lent preference, a general verdict was entered for the defendant; and in Michaelmas Term, 1848, the Court refused a motion by the Attorney-General for a new trial.

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THE KINGSBRIDGE FLOUR MILL COMPANY v. SAME.

ASSUMPSIT.—The first count of the declaration stated that the Company, before and at the time of making of the promise &c., was a joint-stock company, completely registered and incorporated according to and by virtue of the provisions of the 7 & 8 Vict. c. 110, intituled &c.: that the complete registration of which Company was duly certified according to the provisions of the same act, by the Registrar of joint-stock companies: that the Company held certain premises, as tenant to one J. Bickford, at the yearly rent of 30*l.*; and in consideration that the plaintiff, at the request of the Company, had become tenant to the Company of those premises, at the rent of 5*l.* per quarter, the Company promised the plaintiff, that, so long as they continued tenant to J. Bickford, and so long as the plaintiff continued tenant to them, they would indemnify and save him harmless from and against the payment of any of the rent so payable to J. Bickford, over and above the amount of rent payable to them which might from time to time be due and in arrear, and from and against any distress or costs, charges, damages, or expenses which should or might be made, rise, or happen to the plaintiff, for or by reason of the non-payment of the rent, from and against the payment whereof the Company so promised to indemnify him.—Averment, that, during the continuance of the tenancies, and

Joint-stock companies completely registered under the 7 & 8 Vict. c. 110, are bound by contracts made by a competent board of directors, though not under seal, or made in compliance with the requisites of the 44th section; though, *semble*, they cannot enforce such contracts.

But persons seeking to render those companies liable on contracts made with the directors, must shew their authority to bind the Company, either by the production of the registered deed of settlement, or by proof that the body of shareholders authorised particular individuals to

make contracts binding on the Company. A ratification or admission by a competent board of directors will bind the Company.

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at a time when only a small part of the rent payable to the Company was due and in arrear, the Company, disregarding their promise, would not indemnify or save harmless the plaintiff, by means whereof a distress was made by J. Bickford on divers goods and chattels of the plaintiff then being in and upon the said premises, for the sum of 37*l*. 10*s*., then due and in arrear from the Company to J. Bickford, for and in respect of the rent so payable to him, and the plaintiff was compelled to pay 37*l*. 10*s*., together with the costs of the distress, to redeem his goods, &c.—There was also a count for money paid.

The defendants pleaded, first, to the whole declaration, non assumpserunt; secondly, to the first count, that the Company did not hold the premises as tenants to J. Bickford, at the yearly rent of 30*l*; thirdly, to the same count, that the plaintiff was not damnified modo et formâ. Upon which issues were joined.

At the trial, before *Wightman*, J., at the Devonshire Spring Assizes, 1848, it appeared that the defendants were a joint-stock company completely registered, and consisting of eleven directors. In the month of December, 1846, the plaintiff took possession of certain premises, under the following agreement:—

“Stonehouse, 10th December, 1846.

“Mr. Henry Ridley agrees to take, and the Grinding and Baking Company agree to let those two front under stores situated in Newport-street, Stonehouse, with right of landing all goods free of all dues on the same, for the term of six months certain, with liberty to occupy for twelve months, at the yearly rental in full of 20*l*. per annum, the aforesaid rent to be paid quarterly, and three months’ notice to be given by either party at the expiration of the term above mentioned.

“Signed, for the Company,

“THOMAS LUDD, *Secretary*.

“HENRY RIDLEY.

“*Witness*, EDMOND FORD.”

The attesting witness, Ford, was the managing director of the Company. Ludd, who was examined as a witness, said that he entered into the agreement by the authority of the Company, acting as their secretary; and he produced it at the next board meeting, at which, however, only four directors were present. It appeared that Ludd was not in fact appointed secretary until after the agreement was signed. Ludd also stated, that he had heard the directors speak of an agreement in writing with Bickford for a tenancy. On the 15th of June, 1847, Bickford put in a distress upon the plaintiff's goods for 37*l.* 10*s.*, rent due from the Company, when the plaintiff paid that amount and costs in order to redeem his goods. On the same evening the plaintiff's attorney went to a board meeting and complained of the distress, when Ford, who was then chairman, said, "They were very sorry that Bickford had been hasty; that they would see Bickford next morning; they were short of funds, but would arrange by paying part if they could." No other evidence was offered of the tenancy of the Company to Bickford.

It was objected, on behalf of the defendants, first, that, being a corporation, they could not contract except under seal, or, at all events, the plaintiff was bound to prove affirmatively that the persons making the contract had power to bind the shareholders; secondly, that Ludd had no power to bind the defendants by the agreement which he entered into; thirdly, that the statements of the directors were not evidence against the Company of their tenancy under Bickford, which ought to have been proved by the written agreement. The defendants then put in their deed of settlement, which was objected to by the plaintiff as being no evidence against him. By this deed five directors were required to be present at a board meeting. The learned judge directed a verdict for the plaintiff, reserving leave for the defendants to move to enter a nonsuit.

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A rule nisi having been obtained accordingly,

Crowder and Greenwood shewed cause.—First, a joint stock company, completely registered under the 7 & 8 Vic. c. 110, is only a corporation for particular purposes. This is evident from the preamble of the statute, which recites (amongst other things), that it is expedient, after complete registration, “to invest such companies with the qualities and incidents of corporations, with some modification and subject to certain conditions and regulations.” They are peculiarly distinguished from ordinary corporations by the 25th section, which enacts, that, on complete registration being certified, the shareholders “shall be and are hereby incorporated, as from the date of such certificate by the name of the company, as set forth in the deed of settlement, and for the purpose of carrying on the trade or business for which the company was formed, but only according to the provisions of this act, and of such deeds aforesaid, and for the purpose of suing and being sued, and of taking and enjoying the property and effects of the company,” &c., “but so as not in anywise to restrict the liability of any of the shareholders of the company under any judgment, decree, or order for payment of money, &c.; “but every such shareholder shall, in respect of such monies, and subject as after-mentioned, be and continue liable as he would have been if the said company had not been incorporated.” The 44th section, which regulates contracts entered into on behalf of these companies, (with certain exceptions, not material to the present question) enacts, “that every such contract shall be in writing, and signed by two at least of the directors of the company on whose behalf the same shall be entered into, and sealed with the common seal thereof, or signed by some officer of the company on its behalf, to be thereunto expressly authorised by some minute or resolution of the board of directors, applying to the particular case; and that, in the

absence of such requisites, or of any of them, any such contract shall be void and ineffectual, (except as against the company on whose behalf the same shall have been made)." It may be that a company who has not complied with the requisites of that section cannot derive any benefit from the contract; but such company is, nevertheless, liable to be sued upon it. It would be unreasonable to introduce formalities, by omitting which the company might be enabled to avoid their contracts. [*Parke, B.*—It cannot be said that every individual member has power to bind the Company by a contract, and there was no evidence to shew that these directors had any authority.] The third section of the 7 & 8 Vict. c. 110, defines the word "directors" to mean "the persons having the direction, conduct, management, or superintendence of the affairs of a company." Here the agreement was made with persons holding themselves out to the world as managers of the Company, and who by usage act for the general body of shareholders. Then, as to the objection that Ludd had no power to bind the Company by the agreement. [*Parke, B.*—If the board had power to demise, there is evidence that they impliedly sanctioned the agreement. But suppose the board had themselves agreed originally to demise, the plaintiff has not produced the evidence necessary to shew their authority to bind the Company.] With respect to the last point, the language of the chairman, when the plaintiff's attorney complained to the board of the distress, is evidence of an existing tenancy, and a liability in respect of it. [*Parke, B.*—It is no evidence in support of the first count, for there is an issue upon the precise terms of the holding. It may, however, be some evidence under the count for money paid; for, if the board had power to bind the Company, they might make admissions which, on the authority of *Slatterie v. Pooley*(a), would render other

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(a) 6 M. & W. 664.

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proof unnecessary. It was, therefore, some evidence to go to the jury of a promise by the board to recompense the plaintiff for the distress.]

Butt, (with whom was *Collier*), in support of the rule, argued that the agreement was not a matter connected with the business for which the Company was incorporated, and that the plaintiff was bound to shew that the requisites of the 44th section of the 7 & 8 Vict. c. 110 had been complied with, or at least to give some proof that the persons acting as directors had authority to bind the Company; which might be done by producing the copy of the deed of settlement, which is, by the 7th section of that act, required to be registered. [He was then stopped by the Court.]

PARKE, B.—The rule must be absolute. With regard to the first objection, I am satisfied that, under this act of Parliament, these quasi corporations are bound by their contracts, though not under seal, and though they have not complied with the requisites of the 44th section. That section contains a clause, “that, in the absence of such requisites, or any of them, such contract shall be void and ineffectual, *except as against the company on whose behalf the same shall have been made.*” If, then, this contract has in fact been made by the Company, they cannot object that it was not under seal; but it is competent for them to say that the contract was not made by their agents having authority to bind them. In an ordinary partnership, at common law and by usage of trade, one partner has power to bind his copartners in all contracts within the scope of the partnership dealing. But, with regard to these joint-stock companies, which are for some purposes a partnership consisting of a great number of individuals, the same rule does not apply; for instance, one member could not bind the Company by signing a bill of exchange,

or entering into other similar contracts. The question then is, who has authority to bind them? Now, the 7 & 8 Vict. c. 110, s. 7, provides, that there shall be no complete registration of such a joint-stock company until a copy of their deed of settlement shall have been delivered to the Registrar of joint-stock companies. It is, therefore, competent to every person dealing with such a company to ascertain the objects of the company, for the deed must specify them, and also who the directors are; and any person may find in that deed the duties of the directors and their powers as between them and the company. Therefore, every person seeking to bind the company by a contract with the directors, must give some proof of their authority. I perfectly agree that the liability of the company may be shewn without producing the original deed, or a copy of it, provided it be shewn that all persons who formed the company had sanctioned any particular individuals entering into contracts to bind them;—if there were any proof of such authority, no doubt the company would be bound. This case fails, because it is not shewn that the persons who entered into the contract, that is, the directors present at the board meeting, when there was some evidence of their sanctioning the agreement, were competent to bind the Company. It is said that there is some usage of trade, that the directors of these companies shall bind them. That must depend on the particular terms upon which the business of the company is carried on; and no evidence has been given on that subject. Therefore, in the first place, the plaintiff has failed in shewing a competent authority to enter into the contract; and when the deed is produced, it appears that the directors present at the meeting when the agreement was by implication sanctioned, were not of a sufficient number to bind the rest of the shareholders; and unless all are bound, the action cannot be maintained. With respect to the agreement itself, although Ludd, who

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signed it, was not at that time secretary, still it was clearly entered into on behalf of the Company, and if it had been sanctioned by the number of directors sufficient to enter into contracts, it would have bound the Company. But it appears to have been sanctioned at a board meeting, at which the requisite number of directors were not present; and consequently the defendants are not bound by it.

PLATT, B.—I am of the same opinion. Had there been a contract under seal, it might have been taken for granted that the persons who caused the seal to be impressed on the particular instrument had authority to bind the Company. That, however, is not the case here; consequently, it was necessary to shew that the contract was entered into by a number of the governing body competent to bind the Company.

Rule absolute.

THE KINGSBRIDGE FLOUR MILL COMPANY v. THE PLYMOUTH, STONEHOUSE, AND DEVONPORT GRINDING AND BAKING COMPANY.

THIS was another action against the same Company for flour supplied by order of the secretary; and a board of directors, consisting of less than five persons, had acknowledged the debt.

Crowder appeared to shew cause, and attempted to distinguish this case from the preceding, inasmuch as the flour had been consumed on the premises of the Company, and in the course of their trade. [*Parke*, B.—You cannot make persons liable as contracting parties without

shewing that they directly or indirectly authorised the contract. Now, according to the terms of the deed, it would have been sufficient if five directors had authorised the secretary or a servant to purchase the flour, or if they had ratified the acts of those who did order it. But no such proof is given. The rule must, therefore, be absolute to enter a nonsuit.]

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June 28.

DEBT for goods sold, &c.—Plea: that the defendant drew a bill of exchange, and indorsed it to the plaintiff on account of the debt; that the bill was dishonoured; and “although the time for giving due notice of dishonour had elapsed before the commencement of the suit, and although such notice might have been given, yet the defendant had not at that time, nor at any time thereafter, had due notice of the dishonour of the bill.”—Replication, that the defendant had due notice; upon which issue was joined.

At the trial, before *Rolfe*, B., at the Liverpool Spring Assizes, 1848, it appeared that both the plaintiff and defendant resided in Manchester. The bill was dishonoured in London, on Saturday, the 2nd of October, and was sent from London on the following Monday, and received by the plaintiff, in Manchester, on Tuesday the 5th of October. On the same day the plaintiff sent it, during business hours, to the defendant’s counting-house. The messenger found it shut up; he knocked at the door of the counting-house, and no one answering, he came away. On the following day he again went, and found nobody there but a boy, playing on the stairs, who said he was the son of the defendant, and that his father was in London. No notice

The holder of an overdue bill of exchange went during business hours to the counting-house of the drawer, for the purpose of giving notice of dishonour, and finding the counting-house shut, he knocked at the door, and no one answering, he came away without leaving any notice:—*Held*, that these facts did not support an allegation of due notice, but were equivalent to a dispensation of notice, and ought to have been so pleaded.

Seemle, that the holder might have treated the absence of the drawer from his place of business as an

excuse for delivery of notice on the proper day, and that a delivery at the first opportunity, on a subsequent day, would have supported an averment of due notice.

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was left with this boy. On the Monday following, the plaintiff served the defendant with formal notice of dishonour, when he said it was too late. The boy, who was called as a witness for the defendant, said that his father went to London on the Tuesday, and returned on the following Monday, and that, during his absence, the witness remained in charge of the counting-house, and was constantly there during the hours of business. He also said, that if any notice had been left with him he would have forwarded it to his father. The plaintiff's counsel relied upon *Crosse v. Smith* (a) as an authority to shew that the knocking at the counting-house door on the Tuesday, was, in point of law, notice of dishonour. The learned judge told the jury to find for the plaintiff, if they believed that he sent to the defendant's place of business, during business hours, for the purpose of giving notice of dishonour, and the messenger knocked, and found no one there. The jury having found for the plaintiff, leave was reserved for the defendant to move to enter a nonsuit, if the Court should be of opinion that there was no evidence of notice of dishonour.

A rule nisi having been obtained accordingly,

Atherton shewed cause.—The facts proved support the averment of notice. It will probably be argued that such averment can only be proved by a notice in fact, either verbal or in writing; but that is not so. The notice might have been sent by post, or, the place of business being closed, put through the door; in which cases the defendant might have been able to shew that it never reached him. That circumstance, however, would not negative the averment of notice, which renders it evident that notice does not mean something which has come to the knowledge of the party, but the doing certain acts which the law recog-

(a) 1 M. & Sel. 545.

nises as notice. Here what the plaintiff did was clearly equivalent to notice. If the facts had been set out specially in a plea, it would have been bad as a statement of evidence in support of an averment of notice. It is admitted that it would have been sufficient to have left the notice with any person at the defendant's place of business. [*Parke, B.*—In *Housego v. Cowne* (a), we held that a notice left with the drawer's wife, at his house, was sufficient.] In this case, if the party had gone through the idle ceremony of speaking the notice, that would have amounted to no more than what was done. *Crosse v. Smith* (b) expressly decided, that notice to the drawers of a bill, by sending to their counting-house during the hours of business on two successive days, knocking there and making noise sufficient to be heard by persons within, and waiting there several minutes, the inner door of the counting-house being locked, was sufficient, without leaving a notice in writing or sending by the post. There Lord *Ellenborough* refers to a case of *Goldsmith v. Bland*, before Lord *Eldon*, where the only notice was by a clerk, "who went to the counting-house of the indorser, found the counting-house shut up and no person there, saw a servant girl, who said nobody was in the way, and he then returned, without leaving any message. Lord *Eldon* told the jury, that if they thought the indorser was bound to have somebody there, the notice was regular." In the case of a foreign bill, if a notary went to present it at the proper hours of business, and found the counting-house closed, he would protest it for non-payment (c); but in an action on such bill, special circumstances would not be stated, but the only allegation would be that the party had notice of dishonour. [*Platt, B.*, referred to *Firth v. Thrush* (d).]

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Martin, contra.—Notice of dishonour means a commu-

(a) 2 M. & W. 348.

(c) Chitty on Bills, 9th edit., 455.

(b) 1 M. & Sel. 545.

(d) 8 B. & C. 387.

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nication to the party that the bill is unpaid, coupled with a demand for payment. Then how can circumstances shewing that no notice was given, because it could not be given, prove the allegation that notice was given? If the facts amount to a dispensation of notice, the plaintiff should have replied it: *Burgh v. Legg* (a). Under this allegation he is bound to prove a notice in fact. [*Alderson*, B.—In *Carter v. Flower* (b), the Court say, “It is clear that, if no notice has been given at any time, the excuse ought to be set out on the record; if it has been given, but at a time when it would be too late in the usual course, the matter of excuse might probably be used to shew that it was, under the circumstances, in a reasonable time; but, if not given at all, the record must state a sufficient excuse.”] In *Crosse v. Smith*, the present point did not arise; for, under the old system of pleading, it was unnecessary to decide whether the facts amounted to actual notice, or a dispensation of it.

PARKE, B.—We are all agreed that the rule ought to be absolute to enter a nonsuit, but the plaintiff may have a new trial on payment of costs. The point for consideration is, whether what occurred on the first day, on going to the defendant's counting-house, was, in point of law, due notice within the meaning of the allegation in the replication. On the authority of *Crosse v. Smith* (c), my Brother Rolfe thought it was, but we granted a rule in order to consider whether *Crosse v. Smith* went to that extent, and whether the allegation was satisfied by the proof. Since the case of *Crosse v. Smith*, there has been that of *Solarte v. Palmer* (d), a solemn decision of the House of Lords, which has been followed by many others, in which, though the strictness of the rule laid down in *Solarte v. Palmer* has been modified, particularly by this

(a) 5 M. & W. 418.

(b) 16 M. & W. 749.

(c) 1 M. & Sel. 545.

(d) 1 Bing. N. C. 194.

Court, in *Bailey v. Porter* (a), still a notice of dishonour requires a certain formal intimation that the bill has been duly presented and not paid, and that the party giving notice means to hold the other party liable. That latter requisite, according to subsequent cases, need not be positive and express, because it is implied from the fact of the bill being presented. Both *Crosse v. Smith*, and the prior case of *Goldsmith v. Bland*, were decided before the formalities necessary on giving notice of dishonour were settled and acted on; and in *Crosse v. Smith* the pleadings were not such as to make it necessary for the Court to distinguish between a dispensation of due notice and the giving of due notice. In that case, Lord *Ellenborough* laid down, that the going to the counting-house during business hours, and finding no one there to receive the notice, was equivalent to a dispensation of notice, since, according to the usage of trade, a merchant who puts his name to a bill ought to be ready at his place of business to receive notice of the bill's dishonour. In fact, he engages that he will, by himself or his servant, be there; and it is enough for the party who has to give intimation of dishonour, to go to that place, and be ready to deliver it. If the merchant be not there, it is his own fault;—the holder has done all that is required, and the not having found any party at the place of business to receive the notice, is equivalent to a dispensation of it. Therefore, there is no doubt of the propriety of the decision of *Crosse v. Smith*. But I cannot accede to that case, so far as to make the act of going and knocking at the door equivalent to actual notice. If the plaintiff had sent a written notice by post, or had left it by putting it through the door, that would have been an intimation of dishonour, in proper course to be received by the party; or, if the plaintiff found a person there and delivered a verbal notice, that would have been enough. But if he

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(a) 14 M. & W. 44.

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does neither, it is insufficient, unless the facts amount to a dispensation of notice. In the present case the allegation in the replication is not proved, and there has been no intimation of dishonour to satisfy the issue. That allegation means that the plaintiff has given intimation of the bill's dishonour in the way in which he ought to do, according to the usual custom of trade. Now, though there has been a dispensation of notice, the plaintiff does not rely on that, but takes issue on the fact of notice. It is unnecessary to consider whether the plaintiff might not have treated the absence of the party, not as a dispensation from giving any notice, but merely as an excuse for not delivering it on that day—for he was not bound to go more than once—and whether, if he had gone the day after and delivered it, that would have been enough; for that point was not taken at the trial, and our attention is confined to what was done on the first day. Perhaps, if the plaintiff had gone the day after he saw the boy, and delivered a written notice, it would have been a question for the jury, whether he ought not to have left a notice the day before, when he found a person at the counting-house to receive messages. That would depend upon whether the person was a mere boy, or a clerk who kept the books. If he chose to consider the absence of the party from his counting-house as an excuse for delaying the notice, he might treat the notice on Monday as due notice, provided he had no immediate opportunity of serving a better notice. That would again leave the question open, whether, when he saw the boy, he might not have delivered a better notice. But if he chooses to rely on the attempt on the first day as an excuse for notice altogether, the pleadings ought so to have stated it. The rule will, therefore, be absolute for a new trial, on payment of costs of the trial within a week, the plaintiff to be at liberty to amend his replication on payment of the costs of the amendment. Otherwise, a nonsuit to be entered.

ALDERSON, B.—*Solarte v. Palmer* decided this question also, when it decided that a notice of dishonour required a statement of particular matters. It is impossible to say that the knocking at a door is a statement of one thing more than another. The circumstances must, therefore, amount to a dispensation of notice, and ought to have been pleaded as such.

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ROLFE, B.—Since the case of *Solarte v. Palmer*, the expression, “notice of dishonour,” means something beyond mere notice: there must be a demand also. It is clear that knocking at a door cannot be a demand.

PLATT, B., concurred.

Rule absolute accordingly.

ELLIOTT v. THE SOUTH DEVON RAILWAY COMPANY.

June 28.

THIS was an issue directed by the Vice-Chancellor of England, to try whether the South Devon Railway, in deviating from the level in passing over land of which the plaintiff was the owner and occupier, was passing through a “town,” within the meaning of the 11th section of the Railway Clauses Consolidation Act, 8 & 9 Vict. c. 20, which enacts, that, “in making the railway, it shall not be lawful for the Company to deviate from the levels of the railway, as referred to the common datum line described in the section approved of by Parliament, and as

On the trial of an issue whether a railway was passing through a “town” within the meaning of the Railway Clauses Consolidation Act, (8 & 9 Vict. c. 20, s. 11), the judge merely told the jury that the word “town” was to be understood in its ordinary and popular sense:—*Held*, a misdirection, inasmuch as the judge ought to have given such a definition of the word “town” as would have enabled the jury to decide the issue. “Town,” in that act, means a collection of inhabited houses so near to each other that they may reasonably be said to be continuous, and the term will include a space of open ground surrounded by continuous houses; and, *semble*, all open spaces occupied as mere accessories to such houses, although not so surrounded.

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marked on the same, to any extent exceeding in any place five feet, or in passing through a town, village, street, or land, continuously built upon, two feet, without the previous consent, in writing, of the owners and occupiers of the land in which such deviation is intended to be made."

At the trial, before *Wightman, J.*, at the Exeter Spring Assizes, 1848, it appeared that the plaintiff was the owner and occupier of certain fields, which, a few years ago, were unquestionably in the country. The town of Plymouth had, however, considerably increased, and the land adjoining the plaintiff's was now built upon, so that his land was on three sides bounded by houses and streets. On the fourth side it was bounded by building land, not yet built upon. The roads, for some distance beyond the plaintiff's land, were lighted, paved, and watched by the commissioners acting in execution of the local act, 5 Geo. 4, c. xxii. Although the plaintiff's land was, from its situation, very likely to be soon built upon, and was of great value as building land, it was as yet used as pasture land. By the Vice-Chancellor's order it was admitted, that the railway, in passing over the plaintiff's land, had deviated from the level, as referred to the datum line, more than two and less than five feet, without the plaintiff's consent. The learned judge told the jury that the word "town," as used in the act, was to be understood in its ordinary and popular sense; and that it was for them to decide whether the plaintiff's land was in a "town," within the meaning of the act of Parliament; that the assessment and payment of rates under the local act was not a test. The jury found that the railway on the plaintiff's land was passing through a town, within the meaning of the act.

A rule having been obtained, calling on the plaintiff to shew cause why there should not be a new trial, on the ground of misdirection on the part of the learned judge in not properly explaining to the jury the meaning of the word "town:"

Cockburn and *Montague Smith* shewed cause.—The word “town,” in the act of Parliament, has no legal or technical meaning, but is used in its ordinary and popular sense, and therefore did not require any definition. Whether these fields were “town” was a question of fact, which the jury were as competent to decide as the Court. In Johnson’s Dictionary, “town” is said to be “any collection of houses larger than a village.” [*Alderson*, B.—It is where a great body of people within a township are congregated together in houses. It means land continuously built upon. There can be no doubt that the green of Grosvenor-square is in “town.” So, a railway passing through the Temple Gardens would be passing through a town. *Platt*, B.—St. James’s Park is in “town.”] The word is used in contradistinction to the term country. This piece of ground is rateable under the 5 Geo. 4, c. xxii, “for better paving, lighting, cleansing, watching, and improving the town and borough of Plymouth;” the 105th section of which enables the commissioners to assess (amongst other things) “all gardens, tenements, and hereditaments adjoining to or upon any of the streets, lanes, roads, passages, or other public places, which are already made or built, or which shall hereafter be made or built, within the *populous or town part* of the said borough. [*Rolfe*, B.—The case resembles *Baddeley v. Gingell* (a), where we had to determine whether certain houses were “within the street,” for the purpose of rating them. When a word used in an act of Parliament is of doubtful import, the judge ought to explain it.] Suppose any question arose upon the word “moor,” in an act of Parliament, would the judge be bound to tell the jury what, in point of fact, a moor was? [*Alderson*, B.—The jury should have been told that the meaning of the statute was, to give protection to persons who had a collection of houses together; and that,

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(a) 1 Exch. 319.

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putting a liberal construction on the word "town," they should see whether this land was fairly within the ambit of a collection of houses. The judge need not give an exact definition of where a township begins, and a village ends; but he ought to give the jury intimation of what their attention is to be directed to. *Rolfe, B.*—In *C. Litt. 115. b.*, it is said, "that a place cannot be a town in law unless it hath, and in time past hath had, a church and celebration of divine service, sacraments, and burials. No doubt the word "town" in this act means something different from the legal acceptance; and there would have been no misdirection, if the judge had laid down such a definition as would have enabled the jury to come to a correct conclusion.] The learned judge called the attention of the jury to the facts of the case, and left it to them to say whether, under all the circumstances, this land was "town."

Kingslake, Serjt., in support of the rule.—The 272nd section of the Company's Act (7 & 8 Vict. c. lxviii) prohibits any deviation from the levels, "to any extent exceeding in any place five feet, or, in passing through towns two feet, without the consent of the owners, lessees, and occupiers of the land." The 11th section of the Railway Clauses Consolidation Act (8 & 9 Vict. c. 26) uses the words, "in passing through a town, village, street, or land continuously built upon." Is, then, the same definition to apply to each subject-matter different in its nature? If a town varies from a village, and a village from a street, it becomes a question whether land continuously built on, on three sides, and open on the other, is a "town, village, street, or land continuously built on," within the meaning of the act. There must be some definition applicable to each of these particular subject-matters, and they ought to be defined, notwithstanding the definition may be difficult. Whether this land is "town," is a mixed question

of law and fact; and the learned judge ought to have explained to the jury what "town" is, within the meaning of the statute, and have left it to them to say whether this land is "town" within it. The proper definition is a place within the ambit of which inhabitants have collected for the purpose of residence. That would include an open space surrounded with houses, such as Grosvenor-square, but not the mere suburbs of a town. The learned judge ought to have laid down some rule by which the jury would be satisfied that this land was "town" within the meaning of the act. In the absence of any definition, it is not likely that the jury would come to a correct conclusion. [*Parke, B.*—In the city of York, there are public gardens within the walls.] Here the railway does not touch a house or cross a street until after it has left the plaintiff's land.

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PARKE, B.—There must be a new trial. The learned judge was certainly not bound to define the meaning of the word "town," so as to embrace every possible case, yet he ought to have given a definition sufficient to enable the jury to decide the present question, which is, whether
 * the railway can be considered as passing through a "town," within the meaning of the act of Parliament. It would appear that the word "town" is not to be understood in its strict legal interpretation, as a township having a church or a constable, but a place containing a number of houses congregated together—an inhabited spot where the occupation is continuous. No railway entering the boundary of that town can be raised two feet without the consent of the persons through whose land it passes. Does, then, this railway enter the boundary of collected masses of houses? I think not. But it is a question for the jury, whether this open space is continuously surrounded with houses. Such a space may be part of a town, although not built upon, if there are masses of

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houses around it; as, for instance, the green of Grosvenor-square. Unless, therefore, this piece of land is surrounded with houses, so that the railway, in passing the boundary of it, enters masses of inhabited houses, the case is not within the act. I do not mean to say that the open space must be surrounded with houses touching each other, but only continuously surrounded with houses in the popular sense of the word "continuous." There ought to be a new trial, in order that the judge may define the meaning of the term "town" in this act of Parliament.

ALDERSON, B.—I am of the same opinion. What the walls of towns were in ancient times, that is, a boundary, continuous buildings are now. By continuous buildings I do not mean buildings which touch each other, but buildings so reasonably near that the inhabitants may be considered as dwelling together. Within the ambit surrounded by such houses is town, and when the railway passes through that ambit it passes through town. I entertain some doubt whether this space is town: it appears to me country land extending to the town, and not town itself.

ROLFE, B.—The verdict in this case is wrong, because the jury have not been properly directed as to the point to which they should apply their attention. The learned judge was bound to define the meaning of the word "town" sufficiently, for the purpose of enabling the jury to decide the issue. No doubt it is difficult to lay down a definition which would meet every case. At first I thought the definition of my Brother *Parke* was right, but it occurred to me that in foreign towns there are what they call a "place"—a parallelogram of ground, with houses on three sides only, and on the fourth, a garden cultivated and adorned for the sake of these houses, but opening upon the country. Such a spot would, no doubt, be town, although it

is not continuously surrounded with houses. I point to this in order to shew the difficulty of giving an accurate definition which shall meet all cases. Here it was necessary to define what the jury were to consider as "town," and what not.

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PLATT, B.—The learned judge ought certainly to have explained to the jury the meaning of the word "town" in the act of Parliament, and, that explanation not having been given, there ought to be a new trial.

ALDERSON, B., added—I think such a "place" as my Brother *Rolfe* alludes to would be in a town, if the garden was occupied as an accessory to the dwelling-houses; otherwise, if it were an inlet to the country.

PARKE, B.—I think so too. Probably a garden attached to a house, and occupied along with it, should be reckoned as part of the house in considering whether the houses are continuous. The question will depend upon whether this space is surrounded with houses in the popular sense of the word "houses," so as to be within the ambit of the
 • town.

Rule absolute.

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June 21.

FREEMAN and Another, Assignees of LEEDHAM, a Bankrupt,
v. EDWARDS and Others.

To trespass de bonis asportatis by the assignees of L., a bankrupt, the defendants pleaded, that L., before his bankruptcy, being seised in fee of certain copyhold tenements, in consideration of 1400*l.* covenanted to surrender them to the use of the defendants, subject to a proviso for redemption; and for better payment of the interest of the said sum of 1400*l.*, L. granted to the defendants, that as often as the interest should be in arrear for a certain time, it should be lawful for the defendants to enter and distrain for the same. The plea then averred the surrender and admittance of the defendants, and justified the seizure of the goods on the premises

TRESPASS by the plaintiffs, as assignees of John Leedham, a bankrupt, for the seizure of certain goods, the property of the plaintiffs as such assignees.

The defendants pleaded, (with other pleas), thirdly, that before the time when &c., and before and at the time of the making of the indenture hereinafter mentioned, and before J. Leedham became bankrupt, J. Leedham was seised in his demesne as of fee, at the will of the lord of the manor of Wakefield, in the county of York, according to the custom of the said manor, of certain customary tenements and messuages demisable by copy of court roll of the said manor; and being so seised, and before the said time when &c., and before J. Leedham became bankrupt, by a certain indenture then made between J. Leedham of the one part, and the defendants, H. Edwards and W. Busfield, of the other part, J. Leedham, in pursuance of a certain therein-mentioned agreement, and in consideration of the sum of 1400*l.* to him paid and advanced by H. Edwards and W. Busfield, upon the execution of the said indenture, did for himself, his heirs, &c., covenant, promise, and agree to and with the defendants, H. Edwards and W. Busfield, their heirs, &c., that he, J. Leedham, his heirs or assigns, and also Nancy, the wife of him, J. Leedham, for the purpose of releasing all claim and title to free-bench, and all other necessary parties, should and would forthwith well and effectually surrender, pass, and give into the hands of the lord of the manor of Wakefield, in the county of York, according to the custom of that

whilst in possession of L., as a distress for the interest in arrear:—*Held*, after verdict, that the plaintiffs were entitled to judgment non obstante veredicto, for, assuming the grant to operate as a rent-charge, it ceased to be so upon the admittance of the mortgagees; and that afterwards it could only take effect as a covenant, binding such goods of the bankrupt as might happen to be on the premises at the time of the distress.

manor, amongst other messuages or tenements, a certain messuage, dwelling-house, or tenement, commonly called or known by the name or sign of the Queen's Head Inn, with the appurtenances, situate &c., to the use and behoof of the defendants, H. Edwards and W. Busfield, their heirs and assigns for ever, to be holden of the lord of the manor by the rents, suits, and services in respect of the same premises due and of right accustomed; subject, nevertheless, to a certain proviso for redemption of the premises in the indenture contained. And J. Leedham did, in and by the said indenture, covenant and agree to and with H. Edwards and W. Busfield, that he, J. Leedham, should and would well and truly pay and cause to be paid unto H. Edwards and W. Busfield, the principal sum of 1400*l.*, with interest for the same at the rate of 4*l.* 10*s.* for 100*l.* for a year, on the 23rd of June next ensuing the making of the indenture. And, for the better payment of the interest of the said sum of 1400*l.*, J. Leedham did, in and by the said indenture, grant unto H. Edwards and W. Busfield, that, as often as it should happen that the said interest should be in arrear, in the whole or any part, for the space of twenty-eight days after the 23rd of June, or the 23rd of December, in any year during the continuance of the security of the said indenture, it should be lawful for the defendants, H. Edwards and W. Busfield, into and upon the said messuages and tenements, hereditaments, and premises hereinbefore covenanted to be surrendered, or into or upon any part thereof, in the name of the whole, to enter, and distrain for the same interest, and the arrears thereof, and the distress or distresses then and there found to impound, and in pound to detain, and in due time to appraise and dispose of the same according to the due course of law, in the same manner in all respects as landlords are authorised to do in respect of distresses for arrears of rent reserved upon leases for years; to the intent that H. Edwards and W. Busfield should thereby be paid and

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satisfied all arrears of the said interest, and all costs occasioned by the nonpayment thereof, prout patet, &c. Averment, that J. Leedham, being so seised of the said customary messuages and tenements, with the appurtenances, he the said J. Leedham, and also Nancy, his wife, for the considerations aforesaid, and in pursuance of the aforesaid covenant, afterwards and before the said time when &c., and before J. Leedham became bankrupt, at a general court of the lord of the manor of Wakefield, according to the custom of the said manor, to wit, in open court, there surrendered the said customary messuages and tenements, with the appurtenances, to the use of the defendants, H. Edwards and W. Busfield, their heirs and assigns, to the intent that they might be admitted tenants of the said premises, all which premises, being copyhold, were then and there, at the said court, to wit, by copy of court-roll granted unto the said H. Edwards and W. Busfield, to hold to them, their heirs and assigns for ever; subject, nevertheless, to the proviso or agreement for redemption thereof contained in the hereinbefore-mentioned indenture, and with, under, and subject to the powers, provisoes, declarations, and agreements comprised therein, and according to the purport, intent, and meaning of the said indenture, to be holden of the lord of the said manor by the rents, suits, and services, according to the custom thereof; and the defendants, H. Edwards and W. Busfield, were then and there at the same court admitted, to wit, by copy of court-roll, tenants of the said messuages and tenements, according to the form and effect of the said surrender, and according to the custom of the said manor. That, after the making of the said indenture and surrender, and after the admittance of the defendants, H. Edwards and W. Busfield, and whilst the said sum of 1400*l.* remained due and owing upon the said security, and during the continuance of the said security of the said indenture, and whilst the said power of distress was in full force and

virtue, and before the said time when &c., 31*l.* 10*s.* of the interest aforesaid, at the rate aforesaid, of the said sum of 1400*l.* for one half year, was due and unpaid from J. Leedham to the defendants, H. Edwards and W. Busfield, and continued so due and unpaid for more than twenty-eight days next following; whereupon the defendants, H. Edwards and W. Busfield, in their own right, and the defendant, T. Halliwell, as the servant and bailiff of H. Edwards and W. Busfield, and by their command, at the said time when &c., under and by virtue of the said power of distress so granted as aforesaid, and of the said stipulations in the said indenture contained in that behalf, entered into the said messuage or dwelling-house, &c., being in the possession of the said J. Leedham, to distrain for the said half year's interest so due and in arrear, and did then and there distrain the goods and chattels in the declaration mentioned, the same being then in and upon the said premises, and being subject to such distress, as and for a distress for the said sum of 31*l.* 10*s.* so in arrear from J. Leedham: *quæ sunt eadem*, &c.

The plaintiff replied by traversing the possession of J. Leedham at the time of the distress; on which issue was joined, and a verdict found for the defendants. All the other issues were found for the plaintiffs.

Knowles, in last Easter Term, obtained a rule nisi for judgment for the plaintiff, non obstante veredicto, on the above plea: against which

Martin and *Cowling* now shewed cause.—First, the grant operated as a valid rent-charge, and entitled the defendants to distrain upon any goods found on the premises: *Johnson v. Faulkner* (*a*), 2 Wms. Saund. 290, note n. In *Littleton*, sect. 221, it is said, "Also, if one make a deed in this

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(a) 2 Q. B. 925.

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manner, that if A., of B., be not yearely payed at the feast of Christmasse for terme of his life xx. s. of lawfull money, that then it shall be lawfull for the said A. of B. to distreine for this in the mannor of F. &c., this is a good rent-charge, because the mannor is charged with the rent by way of distresse; and yet the person of him which makes such deed is discharged in this case of an action of an annuitie, because he doth not grant by his deed any annuitie to the said A. of B., but granteth only that he may distreine for such annuity." And in the Commentary on that section, Lord Coke says^(a), "And yet no rent is expressly granted out of the manor, but by the grant that he shall distrain for such a yearly sum of money in judgment of law, the manor is charged with the rent." A rent-charge may be granted in fee, or for life, or years, and, in like manner, it may be created out of any estate or term. A grant of a rent-charge for life by a tenant for years is not void, but is good as a chattel interest: *Saffery v. Elgood*^(b). [*Parke, B.*—Here the mortgagee has been admitted, and has got the entire estate.] This clause of distress is usually inserted in mortgage deeds, and the constant practice of conveyancers is an argument in its favour. In Coote on Mortgages^(c), it is said, "To enable a mortgagee to distrain on the mortgagor in possession, an agreement to that effect should be inserted in the mortgage deed, and a sum certain be stated by way of rent." The admittance of the mortgagee to the copyhold gave him no greater estate than he took by the conveyance. A rent-charge lies in grant, and may be created by a copyholder without surrender and admittance. Though, perhaps, the copyholder might have no right, as against the lord, to make the charge, yet it would be good as against the grantor. The power to enter and distrain is not contingent upon surrender and admittance, the effect of which is merely to

(a) Co. Litt. 146. b.

(b) 1 A. & E. 191.

(c) Page 417, 2nd edit.

pass the land, subject to the previous charge and right of distress. What inconsistency is there in a grant by the same deed of the fee simple in copyhold land, and also of a rent-charge? No merger could take place, unless the estate vested by a separate instrument. [*Parke, B.*—This deed operates as a covenant to convey the estate, with an immediate grant of a rent-charge; the estate is not created until admittance.] Then, conceding that the mortgagor had a mere equity of redemption, why should not a rent-charge issue out of it? There is no difference between an equity of redemption and a tenancy at will, and, in the latter case, a rent-charge might clearly be granted. So here, the grant is good as against the assignees of the mortgagor. [*Parke, B.*—There is no estate upon which the rent-charge can attach. A mortgagor in possession is not tenant at will to the mortgagee. The current notion is, that the relation of landlord and tenant does not exist, unless there is a covenant which operates as a lease from the mortgagee to the mortgagor. If there is any definite time during which the mortgagor is to remain in possession, that operates as an interest in him; but, if the time is indefinite, his occupation is merely permissive. *Platt, B.*—If the mortgagee brought ejectment, would he not lay the demise the day after admittance?] If one grants to another an estate in fee simple, by deed containing a covenant that the grantor shall remain in possession, and that the grantee shall have a right to enter and distrain as often as a certain annual sum should remain unpaid, such a covenant would operate as a grant of a rent-charge. [*Rolfe, B.*—If there be a grant of a rent-charge, and afterwards a feoffment is made to the grantee, the rent-charge is extinguished. It is the same here. Admittance means actual possession, delivered by the rod.] The fee simple becomes vested in the grantee, not by any act of the grantor, but by the act of the lord. [*Alderson, B.*—In a

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note to the case of *Keech v. Hall*, in Smith's Leading Cases (a), the conclusion come to is, that the mortgagor is tenant at sufferance.] [He also referred to *Pollitt v. Forrest* (b).]

Secondly, if this be not a rent-charge, it is an authority or license given by the bankrupt for a valuable consideration, and irrevocable by him, and which is valid as against his assignees, by virtue of the 2 & 3 Vict. c. 29. [*Parke, B.*—The bankrupt could not revoke it, because it is a covenant coupled with an interest; but how are the assignees bound by it?] The case of *Hawthorn v. The Newcastle-upon-Tyne and North Shields Railway Company* (c) shews that the assignees would be bound by all the equities arising from the covenant. Besides, the plea expressly avers, and after verdict it must be taken to be found, that the goods were subject to the distress. In order to carry out the intention of the parties, the Court will construe the grant as having some effect after surrender and admittance.

Knowles and Addison, in support of the rule.—Assuming this to be a grant of a rent-charge, with a power of distress, it ceased to be so as soon as the estate passed by surrender and admittance. The object of the provision was to protect the grantee until he was admitted; and it cannot be said that, until that time, the grant would operate in one way, and, after admittance, become something else. When the grantee got possession of the estate, all the powers incidental to the rent-charge were at an end; therefore, whether this grant be treated as a rent-charge or a license, its purpose being answered, it is no longer of any avail. It is, in truth, a mere agreement that the grantee shall be at liberty to take the goods of the

(a) Vol. 1, p. 293.

2, 1848, not yet reported.

(b) Exchequer Chamber, May

(c) 3 Q. B. 734, n.

grantor on the premises; but, when the bankruptcy took place, the grantor ceased to have any interest in the goods. *Howes v. Ball* (a) shews that an agreement of this kind is not binding on the assignees. [They were then stopped by the Court.]

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PARKE, B.—If this grant be treated as a rent-charge, it could only be so as long as the estate remained in the mortgagor, that is, until surrender by him and admittance of the mortgagee. It may be that, until that time, the deed would operate as a grant of a rent-charge affecting the estate, just as a lease for years would be good, though a forfeiture of the copyhold as against the lord, if he chose to insist upon it. But, after surrender and admittance, the rent-charge ceased; for a person cannot at the same moment grant a rent-charge, and also the fee simple in freehold or copyhold land. Therefore, this grant ceased to be a legal obligation on the land, from the moment of surrender and admittance. The defendants' counsel contended, that, in order to carry out the real intention of the parties, we must construe the grant as having some effect afterwards. Its only effect is, that it is in the nature of a covenant binding the bankrupt himself, or his legal representatives, but not third persons. The plaintiffs' counsel argued, that it could not be construed as a covenant; and if it was a rent-charge, it was created for a particular purpose, and that purpose being satisfied, the deed ceased to operate. If they are right, there is an end of the case; if wrong, the covenant could only bind the goods of the bankrupt in this way:—he covenants, that, whenever it should happen that the interest is in arrear for a certain time, and the mortgagee chooses to avail himself of the power, all the goods of the mortgagor shall be liable to a distress, in

(a) 7 B. & C. 481.

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the same manner as to a distress for rent. That operates on all the goods which should be his at the time of the distress; it is no lien on any specific goods. Before the distress and bankruptcy, there were no goods liable to that charge, but only liable to a possibility of distress. It all depended upon the subsequent contingency of what might happen to be on the premises; and it could not be said that any one article in particular was charged. It is not like the case of *Hawthorn v. The Newcastle-upon-Tyne and North Shields Railway Company* (a), for there the goods were in the possession of the Company. Here it was a mere matter of contingency, and the goods, passing to the assignees by the bankruptcy, ceased to be operated on by the covenant, since they were no longer the property of the bankrupt, but of his assignees. Consequently, admitting that the deed ought to be construed as the defendants' counsel contend, this plea is no answer to the action, but is bad in substance, as containing a confession of the right of action, and no sufficient avoidance of it. Therefore, we are bound to give judgment for the plaintiffs, non obstante veredicto.

ALDERSON, B.—I am of the same opinion. It may be that this was a good rent-charge, but then it was put an end to when the mortgagees got possession. Granting that is not so, and that it is now to be converted into a covenant, it is not a covenant to take all the property on the premises, but it is a covenant to take the goods of the mortgagor on the premises; and there is no specific lien on any particular goods. Before the time arrives when the contingency happens which is to govern the matter, the goods cease to be the party's goods. This is neither a rent-charge, nor is it a covenant enabling the mortgagees to seize the goods of the assignees; consequently the plea is bad.

(a) 3 Q. B. 734, n.

ROLFE, B.—I am of the same opinion. I will merely mention, with reference to the extinguishment of the rent-charge, that Mr. *Martin* seemed to suppose that there was some distinction in this case, because the grantees did not take the entire fee simple, but only subject to an equity of redemption. That, however, is immaterial: an estate for lives or years will suspend a rent-charge.

PLATT, B.—I am of the same opinion.

Rule absolute.

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HAGUE v. DANDESON.

June 21.

ASSUMPSIT against the defendant, as registered public officer of the Barnsley Banking Company, for money had and received for the plaintiff's use, and on an account stated.—Plea, non assumpsit.

At the trial, before *Alderson*, B., at the York Spring Assizes, 1848, it appeared that the action was brought to recover 24*l.*, being the amount of two dividends on shares held by the plaintiff in the Barnsley Banking Company. Whenever a dividend was declared, the directors of the bank forwarded to each shareholder a circular, stating the amount of dividend payable to him, and informing him that the same would be paid on his applying at the bank on a day named. Two successive half-yearly dividends having been declared, on each occasion a circular of the above description was sent to the plaintiff. The plaintiff demanded the amount of each dividend respectively at the bank after the day named for payment had elapsed, and was refused payment, on the ground that he had overdrawn his account as a

The deed of settlement of a banking co-partnership provided, "that the directors should have a lien on the shares and stock of every shareholder, for debts due from him to the company;" and that "the directors might cancel and declare forfeited or sell the shares of such shareholder, or otherwise deal with the same as the case might require, for obtaining payment of such debts:"—

Held, that the bank had a lien, not only on the shares but also on the

dividends of a shareholder who had overdrawn his account; and therefore that he could not recover such dividends as money had and received to his use.

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customer, and that the bank had a lien on the dividend for the balance against him. The plaintiff's account was in fact overdrawn, and the balance against him exceeded 24*l*. It was objected, on behalf of the defendant that the action for money had and received would not lie; or, at all events, by the terms of the deed of settlement, the Company had a lien on the dividends as well as the shares. The learned judge nonsuited the plaintiff, reserving leave for him to move to enter a verdict for 2*l*. A rule nisi having been obtained accordingly,

Martin and Hugh Hill shewed cause.—First, the action for money had and received will not lie; neither is there any evidence to support an account stated. No money was ever set apart for the payment of these particular dividends; but, on the application of each shareholder, he would receive the amount due to him out of the general fund of the bank. [The Court then requested them to confine the argument to the question, whether the bank had a lien on the dividends for the balance of the overdrawn account.] The 33rd clause (a) gives the directors a lien on the "shares and stock" of every shareholder, in respect

(a) Sect. 33. "That the directors for the time being shall have a lien on the shares and stock of each shareholder of the said Company for and in respect of all debts, liabilities, and engagements due to and subsisting with the Company, by or on the part of such shareholder, either in respect of cash advances, or any balance or balances, or running bills, or notes, or on any account generally; and whether such debts, liabilities, or engagements be those of such shareholder individually or jointly, or as surety for, or in partnership

with any other person or persons; and such lien shall at all times and in all cases be the first and paramount lien on the shares and stock of every such shareholder; and such directors may, and they are hereby empowered, to cancel and extinguish, and declare forfeited, or to sell or dispose of the shares of such shareholder, either wholly or in part, or otherwise deal with the same as the case may seem to require, in order to obtain satisfaction or payment of all or any part of such debts, liabilities, or engagements."

of debts due from him to the Company. That must necessarily include the profits flowing from the shares and stock. The subsequent part of the clause empowers the directors to cancel or sell the shares, either wholly or in part. The 8th clause renders each shareholder entitled to the profits, and liable to the losses, "in proportion to his shares in the capital fund or joint stock thereof." No argument can be drawn from the conclusion of the 49th section (a), which provides that no proprietor in arrear for

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(a) Clause 49. "That a general annual meeting of the shareholders of this Company shall be held on the second Thursday in the month of February in each and every year during the continuance of this Company, at eleven o'clock in the forenoon, at such convenient place, at Barnsley, as the directors for the time being shall appoint; of which meeting the directors for the time being shall cause fourteen days' previous notice to be given, by means of circular letter signed by the managers, or such other person or persons as they may appoint for that purpose, or by means of an advertisement, in one or more of the neighbouring newspapers; and, such meeting shall be called 'The Annual General Meeting,' and the shareholders qualified according to the provisions contained in these presents, to act and vote at such meeting, who may personally attend the same, shall, and they are hereby invested with full power and authority to decide upon all such motions, questions, propositions, matters and things, as by virtue of these presents, or any supplementary deed or deeds of settlement, shall or may be brought before such annual general meeting; and at every annual general meeting of the shareholders the directors for the time being shall exhibit a true and accurate balance sheet, deduced from the transactions of the preceding year, of the profits and accumulations, and losses of the Company, and shall make a report for the preceding year of the state and progress of the affairs of the Company to the 31st of December last preceding such meeting, and also the result of such other accounts and statements as the directors shall deem expedient for the interests of the Company to be made public; and the dividends of the profits of the then preceding year (except of the first year as hereinafter stated,) shall be then declared by the directors for the time being; and such dividends may be declared half-yearly, if the directors for the time being shall consider it more desirable; and when any dividend shall have been declared, the directors shall, seven days before the day appointed for payment thereof, give notice, by circular letter, addressed to each of the proprietors, of the amount, and time, and place of payment of such di-

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calls shall be entitled to receive any dividend until such arrear and interest shall have been fully paid; for that provision was absolutely necessary for carrying out the objects of the Company. In the case of an ordinary partnership the profits as well as the capital would be liable

The Court then called on—

Pashley to support the rule.—A lien gives no right to the fruits of the pledge. A cow taken as a distress cannot be milked: Roll. Abr. "Distress," (P), pl. 35; Gilbert on Distresses, 65. [*Parke*, B.—If a person pledged a cow with another living at a distance, surely the latter would have a right to milk it.] The question turns on the construction of the deed; and it is submitted, that the parties never intended to give a right to more than the shares. The word "stocks" in the deed is synonymous with "capital fund." Whenever the dividends are intended to be dealt with, they are expressly mentioned, as in the 49th clause, which gives a right to detain them until arrears of calls are paid. *Fowler v. Churchill* (a) decided, that, notwithstanding an order under the 1 & 2 Vict. c. 110, s. 14, charging government stock with a judgment debt, the Bank of England was bound to pay the dividends to the legal owner, and not the judgment creditor. *Bristed v. Wilkins* (b) is an authority to the same effect. [*Parke*, B.—That is because the order is only a charge in equity, and the parties must go into a court of equity to work out the remedy.] At all events, the notice by the bank, that the plaintiff might receive the dividends on applying for them, was a waiver of the lien.

vidend; but no proprietor, nor his executors, administrators, or other representatives, being in arrear in respect of any instalment or call, shall be entitled to receive any

part of such dividend until such arrear, and all interest thereon, shall have been fully paid."

(a) 11 M. & W. 57.

(b) 3 Hare, 235.

PARKE, B.—There is no doubt that the plaintiff was not entitled to the dividends until he went to the bank and demanded them; then, if at that time the bank had a lien on the dividends as well as the shares, this money was never money had and received for the plaintiff's use. The notice by the bank, that, on a future day, a dividend would be payable, does not amount to a waiver of their rights, for they must give notice to each shareholder, in whatever state his account may be. The question is, whether, upon the true construction of the deed, the bank has a lien on the proceeds of the shares, as well as upon the shares. It would be strange if they had not provided for that security, which, according to the existing state of the law, they would have as partners. No doubt, at common law, one partner has a lien upon all that another partner has a right to receive. Then, is there anything in this deed to shew a contrary intention? It authorises the directors "to sell and dispose of the shares, either wholly or in part, or otherwise to deal with the same as the case may seem to require, in order to obtain payment of the debts." That is sufficient to give a lien, not merely on the shares, so as to transfer them at the market price, but if, instead of selling the shares, which might be an injury to the property, they choose to work out the debt by means of the dividends, it is competent for them to do so; and in that case, they have the power of retaining the dividends in order to satisfy the arrears due from the customer. I therefore think that the nonsuit was right.

ALDERSON, B., concurred.

ROLFE, B.—The illustration from the stat. 1 & 2 Vict. c. 110, is unfortunate; for the legislature took it for granted, that, when they gave a charge upon the stock, the dividends were to be affected by it. Doubts, however,

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having been entertained, they passed a declaratory act, the 3 & 4 Vict. c. 82, saying that the provisions of the first act should be deemed to extend to dividends.

Rule discharged.

June 30.

COOKE and FARQUAR v. SEELEY and Another.

The fact of an account having been opened with a banker by one of two partners in his own name, is not conclusive to shew that the account was opened on his own behalf; but it is competent for the banker to prove that he was acting as the agent of the partnership, and that the account was theirs. The mere circumstance, however, of the money deposited being partnership property, is not sufficient for that purpose.

ASSUMPSIT.—The declaration contained a special count for a breach of contract by the defendants, as bankers, in not honouring the plaintiffs' check; also a count for money lent. The defendants pleaded (with other pleas) non assumpserunt.

At the trial, before *Platt*, B., at the Somersetshire Spring Assizes, 1848, it appeared that the plaintiff, Farquar, had opened an account with the defendants, who were bankers at Bridgewater. Farquar carried on business under the name of the Bridgewater Coal Company, and Cooke, the other plaintiff, was a dormant partner in the concern; but that fact was unknown to the defendants. The pass-book, which, as usual, was alternately in the possession of the banker and the customer, was headed "John Farquar, Esq., B. C. C." (meaning "Bridgewater Coal Company"). It was proved that some of the partnership monies had been at times paid into this account, and a letter was put in evidence, written by Farquar to the defendants, in which he spoke of "withdrawing the Company's account." On the part of the defendants it was submitted, that the account was opened by Farquar on his own behalf, and that there was no evidence to go to the jury of the plaintiff Cooke being a party to the contract; and *Sims v. Brittain* (a) and *Sims v. Bond* (b) were cited. The learned judge, being of that opinion, nonsuited the plaintiffs.

(a) 4 B. & Ad. 375.

(b) 5 B. & Ad. 389.

Crowder obtained a rule, calling on the defendants to shew cause why the nonsuit should not be set aside, and a new trial granted; against which—

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Kinglake, Serjt., *Barstow*, and *Phinn*, shewed cause.—Upon the evidence the nonsuit was right. The relation of banker and customer creates a contract of a special nature: *Pott v. Clegg* (a). A breach of such contract is charged in the first count; and there is a distinct issue as to whether both *Farquar* and *Cooke* were customers of the bank. The facts shew that the contract was with *Farquar* alone, and that renders inapplicable the rule laid down in *Cothay v. Fennell* (b), where it is said, “If an agent makes a contract in his own name, the principal may sue and be sued upon it; for it is a general rule, that whenever an express contract is made, an action is maintainable upon it, either in the name of the person with whom it was actually made, or in the name of the person with whom in point of law it was made.” *Skinner v. Stocks* (c) is to the same effect. In *Alexander v. Barker* (d), the defendant applied to one member of a banking establishment for a loan of money, which the latter advanced out of funds in which he and his partners were jointly interested; and it was held, that the firm might sue the defendant for money lent. *Bayley*, B., there said, he remembered “that it was at one period the impression of Lord *Ellenborough*, that where money was lent by a partner, the action must in all cases be brought by the individual with whom the contract was made; but he was afterwards convinced of what is doubtless the true rule, viz. that where a contract is made by one on behalf of others, the action may be brought in the name of the principals.” And *Bolland*, B., says, “If one party applies to another for the loan of money, and is so much in the

(a) 16 M. & W. 321.

(b) 10 B. & C. 871.

(c) 4 B. & Ald. 437.

(d) 2 C. & J. 133.

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dark as not to know whether the party to whom he applies is the member of a firm or not, the applicant must take his chance as to whether the advance is made by the individual or by the firm; but he may, if he choose so to do, guard himself, by saying expressly that he deals with him individually." Here the act of Farquar, in opening an account in his own name, amounts to a declaration that the account is opened for himself individually, and not on behalf of the Company. [*Parke, B.*—It is a question of fact, whether he was acting on his own behalf in lending the money, although he got it from the partnership, or whether he was lending the partnership money. The circumstance of the pass-books having the letters "B. C. C." in them, was some evidence for the jury that he was lending the money on behalf of the partnership.] Where a contract was made by one of several partners in his individual capacity, who at the time declared that the subject-matter of the contract was his property alone, it was held that his declaration was evidence against all the partners, and therefore they could not sue jointly on such a contract: *Lucas v. De La Cour (a)*. [*Alderson, B.*—In that case there was the declaration of one partner that the property belonged to him alone, so there could be no reasonable doubt that the contract was made with him only, and not jointly with the other partners. The difficulty here is, that it is ambiguous.] *Beckham v. Drake (b)* has no bearing on the present point; the question there being, whether a dormant partner could be joined in an action for the breach of an agreement, though not a party named in or signing it. *Emly v. Lye (c)*, and *Siffkin v. Walker (d)*, were cases on bills of exchange, and on that ground distinguishable. In *Trueman v. Loder (e)*, Lord Denman, C. J., says, "Some cases were quoted, in which

(a) 1 M. & Sel. 249.

(b) 9 M. & W. 79.

(c) 15 East, 7.

(d) 2 Camp. 308.

(e) 11 A. & E. 589.

the question, whether an agent or partner bound himself only, or his principal or firm, has been held to depend upon his intention to deal for himself, or for the principal or partnership. But on examining all those cases, it will be found that the contracting party was carrying on two different concerns, one for himself, the other for his principal or his firm. The world would know him in two different characters; and each party dealing with him was bound to inquire in which he appeared on any particular occasion." Here, Farquar having had dealings with the defendants in his individual name, it is not competent to them to say that he was a member of a partnership, and did not contract on his own account. [*Parke, B.*—Although the money may be partnership money, yet if one partner lends it as his own, he must sue alone, for there is no privity between the other partners and the person to whom the money is lent.] Suppose Farquar had died, and then Cooke, a perfect stranger to the bank, had drawn a cheque, would the bankers have been bound to honour it? [*Parke, B.*—It is not a necessary part of the contract that the bankers should honour the drafts of the two: it may be a contract with Cooke and Farquar, that the bankers should honour the drafts of Farquar only.] The memorandum on the pass-book was merely a mode of ear-marking the account.

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Montague Smith (*Crowder* with him), in support of the rule.—The fact of the account being opened in Farquar's name is not conclusive; but it was a question for the jury, whether, in opening the account, he was not really acting as agent for the Company. [*Parke, B.*—In *Sims v. Bond* (a), the Court considered that it might be shewn that a banking account, though in the name of one partner, was, in truth,

(a) 5 B. & Ad. 389.

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the partnership account; but then it must be made out by distinct evidence.]—The letter addressed by Farquar to the defendants, in which he speaks of “withdrawing the company’s account,” was strong evidence to shew that he was acting on behalf of the partnership. If the account had been overdrawn, might not the bankers have sued the Company? [He was then stopped by the Court.]

PARKE, B.—We think there is evidence which ought to have been submitted to the jury, that Farquar, in opening the account, was acting as agent for the partnership. The mere fact of the money being partnership property would not be sufficient, because one partner might take a portion of the partnership property, and lend it to another; but in this case there are two circumstances which did not occur in *Sims v. Bond*: one is, that though the account was opened in the name of Farquar, the letters “B. C. C.” were in the pass-book. It is for the jury to decide whether by that Farquar meant to keep the account on behalf of the Coal Company, or whether those letters were a mere private memorandum. Further, the letter which Farquar wrote to the bank is some evidence for the jury that he was acting on behalf of the Coal Company. Perhaps it would have been wise to have considered a banking account as kept only by the person in whose name it is. However, *Sims v. Bond* decided that the private name in the pass-book is not conclusive, as, by the usage of merchants, the name on a bill of exchange; but its only effect is to throw upon the parties suing the obligation of shewing that they were the real contracting parties. The question in this case will be, whether that is made out to the satisfaction of the jury. If this had not been a deposit by a partner, but by a third person, the matter might have been set at rest, by calling that person to prove on whose account he really was lending the money to the bank

The difficulty is increased when the person who opens the account is not merely the agent of, but a partner in, the firm on whose behalf he opens the account.

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ALDERSON, B.—I am of the same opinion. There was a very slight case; but still there was evidence to go to the jury on the question whether Farquar, in opening the account, was really acting as agent for the partnership, or on his own behalf.

PLATT, B.—Possibly I entertained a wrong impression; but I am still of opinion that there was no evidence for the jury. The account was opened by Farquar, but the pass-book was headed with the letters "B. C. C.," in addition to his name. That may have been for the purpose of distinguishing this Farquar from another customer of the same name. If the account was intended to be opened and carried on with the money of the partnership, the items do not correspond, and they are perfectly inconsistent with the letter written by Farquar, in which he assumes to act for the Company. Perhaps my impression, though strong, is erroneous. There ought, therefore, to be a new trial.

Rule absolute.

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DOE *d.* KNIGHT *v.* RICHARD SPENCER.SAME *v.* SANSUM.

July 13.

The General Inclosure Act, 41 Geo. 3, c. 109, s. 16, authorises the commissioners to make partition of land held in common, upon the request in writing of the tenants in common, or any or either of them. A local act for inclosing land within the parish of M., (59 Geo. 3, s. 31), enabled commissioners

THIS was an ejectment, brought on the demise of John Knight, dated the 10th of July, 1842, to recover one undivided moiety or half part of and in a house and orchard and two meadows, in the parish of Martock, in the county of Somerset. At the trial, before *Platt*, B., at the Summer Assizes for that county, in the year 1845, a verdict was found for the plaintiff, subject to the opinion of the Court on a case which stated in substance as follows:—

The lessor of the plaintiff claims to be entitled under the will of Elizabeth Goodden, hereinafter set out.

By indentures of lease and release, bearing date the 15th and 16th days of May, 1758, certain tenements and lands (including the entirety of the lands, one undivided moiety

to make exchanges of land with the consent of the owners, whether tenants in fee-simple or for life. Sect. 32 provided for the costs of partition; but there was no clause in terms authorising partitions. The 59 Geo. 3 received the royal assent on the 19th May, 1819, at which time O. was seized of an undivided moiety of certain land in M. for the life of K., the other moiety being vested in A. S. in fee. On the 2nd August, 1819, C. and A. S. made a claim in writing under the 41 Geo. 3, c. 109, in respect of the land so held by them as tenants in common; and on the 13th September, 1819 A. S. died intestate, leaving E. S. his heir. On the 11th August, 1826, the commissioners made their award, and thereby made certain allotments, numbered respectively on a map 13, 87, and 88, to C. and A. S., in respect of their interests in the open lands to be allotted and divided; and they also, under the head "Exchanges," allotted to E. S. an undivided moiety of certain land sought to be recovered in this action, as also of the said three pieces of land numbered 13, 87, and 88, the other moiety being therein stated to be already vested in E. S. in exchange for, as well the undivided moiety of the said E. S. in certain other old inclosed lands, which the commissioners thereby allotted to C., the other moiety thereof being therein stated to be then already vested in him, as also the entirety of a close belonging solely to E. S.:—*Held*, that the local act having, by the 32nd section, contemplated partitions, but containing no authority for that purpose, the legislature must have intended that they should be effected under the 41 Geo. 3, c. 109, s. 16; and that this allotment could not be supported as a partition under that act; because, first, C. was only tenant *pur auter vie*, and, as such, had no authority to consent to a partition; secondly, because one of the tenants in common was to take as his share in severalty a close which, before the partition, formed no part of the land held in common, but was the separate property of the other tenant in common.

Also, that the words "tenants for life," in the 31st section of the local act, 59 Geo. 3, included "tenants *pur auter vie*," and that the allotment was good under that act as an exchange.

Also, that two tenants in common may exchange with each other their respective moieties of different parts of the land held in common; and where the moiety of an estate is settled to uses, with a power of exchange in the trustees, such a power may be well executed by dividing the land into two portions to be held in severalty, one to the uses of the settlement, the other by the party entitled to the other moiety.

Also, that the allotments made to C. and A. S. were not void by reason of their having been made after the death of A. S., and when E. S., his heir, was entitled.

whereof is sought to be recovered in this action) were limited, after the solemnisation of a then intended marriage, which afterwards took effect, between Thomas Goodden and Ann Damer, to the use of the said Thomas Goodden for life, remainder to trustees to support contingent uses, remainder to the use of the child or children of the said intended marriage, in such shares and proportions, and for such estates and interests, as the said Thomas Goodden and Ann his intended wife, or the survivor of them, should by any deed or deeds, or by his or her last will and testament, limit or appoint; and in default of such limitation or appointment, to various uses, which did not take effect.

The said Thomas Goodden and Ann Damer were married on the 20th day of August, 1758. Thomas Goodden died before his wife, on the 12th day of October, 1779. There were issue of Thomas Goodden and Ann Damer five children. Of these children there were two only, viz. Ann and Elizabeth, who became material to the title. Ann was born on the 7th of September, 1762, was married to Thomas Knight on the 25th of November, 1783, and died in December, 1795. Elizabeth was born on the 27th of February, 1764, and died unmarried, on the 24th of February, 1787.

The said Ann Goodden (formerly Ann Damer), after the death of Thomas Goodden, her husband, by an indenture of appointment, bearing date the 8th day of March, 1784, in pursuance of the power vested in her by the hereinbefore-mentioned indentures, duly limited and appointed the lands and tenements included in those indentures, from and after the death of the said Ann Goodden, to the use of the said Ann Knight and Elizabeth Goodden, in fee, as tenants in common.

The said Elizabeth Goodden died before her mother, on the 24th of February, 1787, seised by virtue of the before-mentioned appointment of the reversion in fee, expectant on the death of her mother, of and in one undivided moiety

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of the said tenements and lands mentioned in the above-mentioned indentures. The said Elizabeth Goodden being so seised made a will, dated the 11th of December, 1786, under which the lessor of the plaintiff now claims title. The material parts of this will, which was duly executed and attested to pass real estate, were as follows:—"I give and devise all and singular the messuages, tenements, lands, and hereditaments which I am seised of or entitled unto, either in possession, reversion, remainder, or expectancy, situate, lying, and being within the parish of Martock, or elsewhere in the county of Somerset, unto my brother-in-law, and sister, Ann Knight, his wife, of Bower Hinton, yeoman, for and during the term of their natural lives; and from and after their decease, I give and devise the same unto my nephew, John Goodden Knight, son of my said brother-in-law and sister, Ann Knight, his heirs and assigns for ever. But in case the said John Goodden Knight should not survive my said brother-in-law and sister, Thomas and Ann Knight, and should die without an heir lawfully begotten, then and in such case I give and devise the same to the next heir of the said Thomas and Ann Knight, my brother-in-law and sister as afore-said, their heirs and assigns, for ever."

The said Ann Goodden, the mother of the testatrix, died in September, 1793. John Goodden Knight, mentioned in the said will, died shortly after the testatrix, viz. in June, 1787, without issue; in fact, he was then a child not a year old. Soon after the death of this son, another son of the said Thomas and Ann Knight was born, who was also called John Goodden. This last John Goodden Knight was born in November, 1787. On the 3rd of November, 1811, he married Mary Welch; he died in June, 1823; Mary, his wife, died in June, 1833. The lessor of the plaintiff is the eldest son of the marriage of the said last mentioned John Goodden Knight and Mary his wife.

The said Thomas Knight, and Ann his wife are both

dead. The said Ann, the wife, died in December, 1795, and the said Thomas Knight died in June, 1842.

The case then set out indentures of lease and release, bearing date the 1st and 2nd of July, 1814, between Thomas Knight, described as surviving devisee for life, and the second-named John Goodden Knight, described as reversionary devisee in fee under the will of Elizabeth Goodden, (and certain parties, mortgagees and trustees), whereby the undivided moiety of the lands and tenements included in the indentures of the 15th and 16th of May, 1758, vested in Robert Chaffey and William Chaffey, during the life of Thomas Knight.

In the 59 Geo. 3, an act was passed, intituled, "An Act for inclosing lands within the parishes of Martock and Muchelney, in the county of Somerset."

On the 14th of August, 1826, the commissioners acting under the above-mentioned act made their award in writing under their hands and seals, whereby, after reciting (inter alia) the above-mentioned act, wherein is recited the 41 Geo. 3, intituled, "An Act for consolidating in one Act certain provisions usually inserted in Acts of Inclosure, and for facilitating the mode of proving the several facts usually required on the passing of such Acts," the commissioners awarded (so far as material to the present question) as follows:—

"We do hereby set out, allot, and award all and every part and parts of the open and common arable fields and lands and common meadows in the said parish of Martock, unto and between the several proprietors of and persons interested in the same respectively, according to the extent and value of their respective lands, rights, and interests therein before the passing of the first recited act, in the manner directed by such act; (that is to say), inter alia, unto Robert Chaffey, William Chaffey, and Arthur Spencer, one piece or parcel of meadow-land, containing by admeasurement one acre, two roods, and three perches, lying in

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Hinton Mead, numbered 13 on Hinton Mead map, in lieu of and satisfaction for the lands, rights, and interests of the said Robert Chaffey, William Chaffey, and Arthur Spencer, in the said meadow called Hinton Mead, the entirety of which said piece of land last hereinbefore allotted is hereinafter vested in the said Arthur Spencer, by an exchange hereinafter contained. And we, the said commissioners, do hereby set out, allot, and award all the residue and remainder of the said open and commonable pastures respectively, called Whetmoor, Lowsham, and Case, unto, for, and amongst all and every the owners and proprietors and persons claiming and being allowed rights of common thereon respectively, in the manner and under the directions and regulations of the said first recited act; (that is to say), [allotments in Whetmoor to the proprietors of tenements in the parish of Martock;] unto Robert Chaffey, and William Chaffey, and Arthur Spencer, one piece or parcel of land, containing by admeasurement &c., numbered 87 on the same map, in respect of the said Robert Chaffey's, William Chaffey's, and Arthur Spencer's freehold tenement, called Dames; and one other piece or parcel of land, containing by admeasurement &c., numbered 88 on the same map, in respect of the said Robert Chaffey's, William Chaffey's, and Arthur Spencer's freehold tenement, called Blind Lane."

And in the said award there is also contained, under the head "Exchanges," as follows:—

"Also we, the said commissioners, in further pursuance and by virtue of the power and authority to us given in and by the said recited act of Parliament, do hereby set out, allot, and award the several lands, new allotments, and old inclosures, situate within the several parishes of Martock and Muchelney, and hereinafter particularly described, in lieu of and exchange for each other, unto the several persons respectively hereinafter named, and in such manner as is hereinafter expressed concerning the

same, such exchanges having been made with the consent of the respective owners, proprietors, and other persons seised of the lands, hereditaments, and premises so respectively exchanged, such consent having been testified by writing under their respective hands; (that is to say), unto the said Edward Spencer one undivided moiety of several tenements and closes of land hereinafter described, the other undivided moiety being already vested in the said Edward Spencer; (that is to say), the capital messuage or dwelling-house, with the outhouses, garden, and orchard thereto belonging, containing by admeasurement &c.; three closes of meadow, called Old Leazes, containing by admeasurement &c.; a piece or parcel of land, numbered 13, on Hinton Mead map, containing by admeasurement &c.; and two pieces or parcels of land, numbered respectively 87 and 88, on Whetmoor map aforesaid, containing together by admeasurement &c.; which said last mentioned three pieces of land are hereinbefore allotted and awarded to the said Edward Spencer and Robert and William Chaffey, in exchange of and for the moiety and lands next hereinafter allotted and awarded to the said Robert and William Chaffey; unto the said Robert Chaffey and William Chaffey, the undivided moiety of him the said Edward Spencer of and in the several tenements and closes of land hereinafter described (the other undivided moiety of the same being already vested in the said Robert Chaffey and William Chaffey); (that is to say), a messuage or dwelling-house called Blind Lane House, with the outhouses, out-buildings, garden, and orchard thereto belonging; two closes of meadow, called Mill Closes; a close of arable, called Dyed Way; a close of arable, called Great Buckland; a close of arable, called Little Buckland; an orchard and garden, called Saunders's; and also the entirety of a close of arable land, called Trott's Acre, in exchange for the said moiety last hereinbefore allotted to the said Edward Spencer."

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The said capital messuage or dwelling-house, with the out-houses, garden, and orchard thereto belonging, and two of the said three closes of meadow, called Old Leazes, are the premises in respect of which this action has been brought. The said close, called Trott's, formed no part of the tenements contained in the previous title set out in this case.

The said Robert Chaffey and William Chaffey were in possession of the undivided moiety conveyed by the lease and release of the 1st and 2nd of July, 1814, from that time until the said award.

By indentures of lease and release, dated the 1st and 2nd of February, 1800, the undivided moiety which was appointed to Ann Knight, as hereinbefore mentioned, became and was vested in Arthur Spencer in fee simple.

The said Arthur Spencer, together with the said Robert Chaffey and William Chaffey, on the 2nd day of August, 1819, made a claim, which was delivered to the clerk to the commissioners acting in the execution of the said inclosure act, and thereby claimed to be interested in the lands intended to be divided, allotted, and inclosed under the said act, in respect of the entirety of the lands, one moiety whereof is sought to be recovered in this ejectment.

The said Arthur Spencer died on the 13th of September, 1819, intestate as to his real estate, leaving Edward Spencer, his nephew and heir-at-law, him surviving; and the said Edward Spencer died intestate on the 8th of May, 1831, and was at the time of the said award seised in fee of the said undivided moiety, which was appointed as aforesaid to the said Ann Knight.

The said Edward Spencer, and those claiming under the said Edward Spencer, down to and including the defendant, have held possession of the whole of the premises awarded to them, from the date of the said award to the present time.

The lessor of the plaintiff claims to be entitled to the undivided moiety sought to be recovered in this action,

under the said will of the said Elizabeth Goodden, notwithstanding the said indentures of lease and release of the 1st and 2nd of July, 1814, and notwithstanding the said proceedings under the Inclosure Act. The defendant will contend, that, even if the lessor of the plaintiff shews title under the will, he cannot, upon the facts disclosed in the case, maintain ejectment for the undivided moiety of the said premises.

If the Court shall be of opinion that the plaintiff is entitled to recover, the verdict entered for him is to stand; otherwise the verdict is to be entered for the defendant.

Humphry, for the plaintiff (a).—At the time these allotments were made, it was supposed that both parties were seised in fee simple. The case of *Doe d. Knight v. Chaffey* (b) shews that Robert Chaffey and William Chaffey were only tenants pur auter vie, that is, for the life of Thomas Knight. The question then is, whether the allotment is good, either as a partition or an exchange, under the General Inclosure Act, 41 Geo. 3, c. 109, or the Local Act, 59 Geo. 3, “for inclosing lands within the parishes of Martock and Murchelney, in the county of Somerset.” It is submitted that it is not an exchange but a partition, and, as such, invalid for want of a due compliance with the provisions of the General Inclosure Act (c). The 15th section of that act authorises the commissioners to make *exchanges*, “with the consent of the respective owners, proprietors, or other per-

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(a) The case was argued in Michaelmas Term, 1847, Nov. 10 and 15.

(b) 16 M. & W. 656.

(c) Sect. 15 enacts, “that such commissioner or commissioners shall, and he or they is and are hereby authorised to set out, allot, and award any messuages, buildings, lands, tene-

ments, hereditaments, new allotments, or old inclosures, within such parish or manors, in lieu of or in exchange for any other messuages, buildings, lands, tenements, hereditaments, new allotments or old inclosures, within the said parish or manors, or within any adjoining parish or place, so as that all such ex-

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sons seised of the lands, hereditaments, and premises, which shall be respectively so exchanged." The 16th section (a) enables the commissioners to make *partition* of the messuages, lands, and allotments "to such of the said owners or proprietors who shall be entitled to the same

changes be made with the consent of the respective owners, proprietors, or other persons seised of the lands, hereditaments, and premises, which shall respectively be so exchanged as aforesaid, or of the husbands, guardians, trustees, committees or attornies, acting for or on behalf of such owners, proprietors, or other persons respectively, who are under coverture, minors, lunatics, or beyond the seas, or under any other disability or incapacity of acting for themselves (such consent to be testified by writing under their respective hands), and so that all such exchanges be ascertained specified, and set forth in the award of such commissioner or commissioners, and so that all such exchanges of any lands, tenements, or hereditaments, belonging to or held in right of any church, chapel, or ecclesiastical benefice, shall also be made with the like consent, in writing, of the bishop of the diocese, and of the patron of any church, chapel, or ecclesiastical benefice, for the time being; and all such exchanges so made as aforesaid shall be for ever good, valid, and effectual in the law, to all intents and purposes whatsoever."

(a) Sect. 16.—"And whereas it may happen that some of the proprietors of messuages, cottages, tenements, or lands, in

any such parish or manor, and persons entitled to allotment or allotments, to be made by virtue of any such act, may be seised thereof or entitled thereto in joint tenancy, or as coparceners or tenants in common, and cannot, by reason of infancy, settlement, or absence beyond seas, make an effectual division thereof, be it therefore enacted, that it shall be lawful for any such commissioner or commissioners, and he or they is and are hereby authorised and empowered (upon request, in writing, of such joint tenants or coparceners, or tenants in common, or any or either of them, or of the husbands, guardians, trustees, committees, or attornies of such as are under coverture, minors, lunatics, or under any other incapacity, as aforesaid, or absent beyond seas), to make partition and division of the messuages, cottages, tenements, lands, and allotment or allotments, to such of the said owners or proprietors who shall be entitled to the same, as joint tenants, coparceners, or tenants in common, and to allot the same accordingly to such owners and proprietors in severalty; and from and immediately after the said allotments shall be so made and declared, the same shall be holden and enjoyed by the person or persons to whom the same shall

as joint tenants, coparceners, or tenants in common." The word "owner," in those sections, means "owner in fee;" and the 41 Geo. 3, c. 109, contains no provision enabling a tenant for life to bind those in remainder. But, by the 31st section (a) of the Local Act, 59 Geo. 3, *exchanges* may be made with the consent of the owners and proprietors, whether "tenants in fee simple or for life." That is an express declaration by the legislature, that, so far as regards an exchange, the consent of a tenant for life shall be sufficient to give it validity; but not so with partitions. The 32nd section (a), which contemplates the case of par-

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be allotted in severalty, in such and the same manner, and subject to such and the same uses as the undivided parts or shares of such estates would have been held in case such partition and division had not been made."

(a) Sect. 31 enacts, "that it shall be lawful for the said commissioners to set out, allot, and award any lands, tenements, or hereditaments, within the said several parishes of Martock and Muchelney, or either of them, in lieu of or in exchange for any other lands, tenements, or hereditaments within the same parishes respectively, of either of them, or within any adjoining parish, township, or place, provided that all such exchanges be ascertained, specified, and declared in the award of the said commissioners, and be made with the consent of the owner or owners, proprietor or proprietors of the said lands, tenements, and hereditaments, whether such owner or owners, proprietor or proprietors, shall be a body or bodies politic, corporate, or collegiate, or a tenant or

tenants in fee simple or for life, or in fee tail general or special, or by the courtesy of England, or for years determinable on any life or lives, by and with the consent of the lessor or lessors, but not otherwise, or with the consent of the guardians, trustees, feoffees for charitable or other uses, husbands, committees, or attornies of or acting for any such proprietors or owners as aforesaid, who at the time of making such exchange or exchanges shall be respectively infants, feme covert, lunatics, or under any other legal disability, or who shall be beyond the seas, or otherwise disabled to act for themselves, himself or themselves, such consent to be testified in writing, under the common seal of the body politic, corporate, or collegiate, and under the hands of the other consenting parties respectively; and all and every exchange and exchanges so to be made shall be good, valid, and effectual in the law, to all intents and purposes whatsoever."

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titions as distinct from exchanges, leaves the former to rest on the provisions of the General Inclosure Act. That distinction between partitions and exchanges is preserved by the legislature in the 6 & 7 Will. 4, c. 115, the 37th section of which is in terms the same as the 32nd section of the Local Act, 59 Geo. 3. The 8 & 9 Vict. c. 118, which applies to the exchange of lands, by the 16th section, defines the meaning of the terms, "persons interested in land." It is evident, therefore, that the power to make exchanges, and the power to make partitions, rest upon totally distinct provisions. Here the partition could have no effect after the determination of the estate of the tenant for life, and the lessor of the plaintiff, who is entitled in remainder, is not bound by any act of his. In *M'Queen v. Farquar*(b), the question was raised, whether a power of exchange could be executed by a partition; and the Lord Chancellor there says(c), "Exchange and partition are very different. According to Sheppard's Touchstone, and other old books, you cannot exchange until there has been a partition. There is infinite difficulty in saying, a partition under the execution of a power by a tenant for life, with those who have the inheritance in the other moiety, could be called an exchange. I am not surprised that the Lords Commissioners, in *Abel v. Heathcote*(d), had considerable doubt upon it; and I should rather have said, upon that case, that a partition was a conveyance for 'such other equivalent interest' in lands, according to the expression of the deed, as to the trustees should seem proper, than put it upon the ground that a power of

(a) Sect. 32 enacts, "that all costs, charges, and expenses attending the making of any exchanges or partitions by virtue of this or the said recited act, shall be paid, borne, and defrayed by the several persons making such exchanges and partitions, in such

manner and in such proportions as the said commissioners shall by their award order and direct."

(b) 11 Ves. 467.

(c) Page 476.

(d) 4 Bro. C. C. 278; 2 Ves. jun. 98.

exchanging authorised an exchange by partition." In *Watkins on Conveyancing*, tits. "Estate in Parcenary"^(a), and "Tenancy in Common"^(b), it is laid down as an elementary principle, that "coparceners cannot exchange with each other until partition." In *Sugden on Powers*^(c), it is said, "In *The Attorney-General v. Hamilton*^(d), Sir Thomas Plumer, V. C., thought it not safe to act upon the doctrine, that a power to sell or exchange authorised a partition. A partition and an exchange are, he observed, well known modes of assurance, perfectly distinct from each other, each having its own rules. A power to make a partition would not warrant an exchange." Here, although the allotment is headed "Exchange," it is in truth a partition. If a party executes a deed with the intention of executing a particular power, that will operate, although the party may possess another power: *Boughton v. Sandilands*^(e); *Sugden on Powers*, 423^(f).—Secondly, the allotment being made to Arthur Spencer renders the award void at law, though perhaps it might be sustained in equity. Arthur Spencer sent in his claim, and afterwards died, leaving Edward Spencer his heir; but the commissioners, nevertheless, make the allotment to Arthur Spencer.

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Barstow, for the defendant, argued, as to the first point, that, conceding there could be no exchange until after partition, it was evident from the 32nd section of the Local Act, 59 Geo. 3, that the legislature intended to authorise partitions, and that this allotment would operate as a valid partition under the General Inclosure Act, 41 Geo. 3, c. 109, s. 16. As to the second point, he argued that the part of the award headed "Exchanges," shewed that the commissioners intended to make the allotments to Edward

(a) Page 96, 8th edit.

(b) Page 111, 8th edit.

(c) Vol. 2, p. 481, 7th edit.

(d) 1 Madd. 214.

(e) 3 Taunt. 342.

(f) 7th edit.

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Spencer, as they described him as being in possession of Arthur's moiety of those allotments.

Humphry replied.

Cur. adv. vult.

The case of *Doe d. Knight v. Sansum*, in which precisely the same question arose, was argued in Easter Term last, (May 8), by

Humphry, for the plaintiff, who adopted the same arguments as in the former case.

Butt, for the defendant, contended that the plaintiff's title was barred by the award made under the Martock Inclosure Act; that the transaction in legal effect amounted to an *exchange*, and was therefore good. He cited *The Attorney-General v. Hamilton*(a), *M'Queen v. Farquhar*(b), *Doe d. Lord Suffield v. Preston*(c), and *Doe d. Sweeting v. Hellard*(d).

Humphry replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

ROLFE, B.—This was an ejectment brought to recover an undivided moiety of a house and orchard, and of two meadows, in the parish of Martock, forming part of the property devised by the will of Elizabeth Goodden, dated in 1786. The case of *Doe d. Knight v. Chaffey*(e) decided that the present lessor of the plaintiff is the person who, on the death,

(a) 1 Madd. 214.

(b) 11 Ves. 467.

(c) 7 B. & C. 392.

(d) 9 B. & C. 789.

(e) 16 M. & W. 656.

in 1842, of Thomas Knight, the tenant for life under Elizabeth Goodden's will, became entitled to the property thereby devised, and he is therefore entitled to recover in this action, unless by some intermediate transaction his title has been defeated. The defendant contends, that the plaintiff's title was destroyed by the effect of the Martock Inclosure Act, and the award made in pursuance of it, whereby the moiety of the house, orchard, and meadows, the subject of this action, was allotted and awarded to Edward Spencer, in lieu and exchange for other property, which, by the same award, was allotted and awarded to Robert Chaffey and William Chaffey, the parties then entitled, by virtue of a conveyance from Thomas Knight, of his life interest under Elizabeth Goodden's will. If this allotment to Spencer was valid, the title of the lessor of the plaintiff to the moiety now in question was defeated.

The Inclosure Act received the royal assent on the 19th May, 1819, at which time the moiety of the property devised by the will of Elizabeth Goodden was vested in Messrs. Chaffey, for the life of Thomas Knight, the other moiety being vested in Arthur Spencer, in fee. This property consisted partly of messuages and old inclosures, and partly of open land in the parish of Martock. On the 2nd August, 1819, Messrs Chaffey and Arthur Spencer duly made a claim in writing, under the Inclosure Act, in respect to the open land to which they were thus entitled as tenants in common; and on the 13th September, 1819, Arthur Spencer died intestate, leaving Edward Spencer his heir.

On the 11th August, 1826, the commissioners under the Inclosure Act made their award, and thereby made certain allotments, numbered respectively on the map 13, 87, and 88, to Messrs. Chaffey and Arthur Spencer, in respect of their interests in the open lands, to be allotted and divided; and they also, under the head of "Exchanges," allotted to Edward Spencer (inter alia) an undivided moiety, as well of a messuage, orchard, and meadows therein described, (being the messuage, orchard, and meadows, the moiety of

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which is sought to be recovered in this action), as also of the said three pieces of land numbered 13, 87, and 88, the other moiety being therein stated to be then already vested in the said Edward Spencer, in exchange for, as well the undivided moiety of the said Edward Spencer in certain other old inclosed lands in the said parish, which the said commissioners thereby allotted to the said Messrs. Chaffey, the other moiety thereof being therein stated to be then already vested in them, as also the entirety of a close called Trott's Close, belonging solely to Spencer. If this award was effectual to pass the moiety of the messuage, orchard, and meadows in question to Edward Spencer, then the present lessor of the plaintiff is barred, and he cannot recover.

It was however objected, that this allotment, though described in the award as an exchange, was in truth not an exchange, but a partition, and that the act, though it authorises exchanges, does not authorise partitions.

It is true that there is no clause in the Act authorising partitions, though there is a clause, namely, s. 31, authorising exchanges, if made with the consent of the owners, the section in substance defining who are, for the purpose of such consent, to be considered owners. But although the Local Act does not in terms authorise partitions, yet it certainly contemplates their being made, for, in section 32, express provision is made for the costs attending them.

The legislature, therefore, contemplating the making partitions, but having given no express authority for that purpose in the Local Act, must have intended that they should be effected, when necessary or expedient, under the provisions of the General Inclosure Act, 41 Geo. 3, c. 109. The 16th section of that act is as follows (a): [His Lordship read the section.]

This section, it will be observed, authorises the commissioners to make partition of land held in common, upon

(a) Ante, p. 760, note.

the request in writing of the tenants in common, or *any or either* of them. Now, in this case, Edward Spencer was, at the date of the award, seised in fee of one moiety of the messuage, orchard, and meadows, as tenant in common with the parties entitled under Elizabeth Goodden's will to the other moiety; and under the award, he in like manner became entitled, as heir of Arthur Spencer, to a moiety of the new allotments made to the Messrs. Chaffey and to Arthur Spencer, in respect of their interests in the lands to be divided and inclosed. Such being the interests of the different parties, the commissioners have allotted a moiety of part of the property so held in common to Edward Spencer, and the moiety of the other part to the Messrs. Chaffey, as the parties in possession of the moiety derived from Elizabeth Goodden's will.

On the part of the plaintiff, it was contended, that this allotment, though described as an exchange, was in truth a partition, and, as such, invalid, for want of a due compliance with the General Inclosure Act.

We are all clearly of opinion, that, as a partition, it cannot be supported.

On referring to the 16th section of the General Inclosure Act, it appears that the commissioners have authority to make partition, at *the request, in writing*, of the tenants in common, or *any or either* of them. It is not necessary, as in case of exchanges, that there should be the consent of both parties. The commissioner is authorised to make partition at the request of any one of the tenants in common; and this distinction is founded on very good grounds. Putting the Inclosure Act out of the question, no exchange could be made without the concurrence of both the exchanging parties; whereas any one tenant in common can compel a partition. And it is very reasonable, therefore, that a similar distinction should exist in respect of the powers given to a commissioner of inclosure. As to exchanges, he has only power to sanction what the parties do for themselves. As to partitions, he has power, at the

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instance of any one party interested, to bind all the rest. Now, in this case, Edward Spencer was one of the tenants in common, being entitled to his moiety in fee simple. There can be no doubt, therefore, but that, on his written request, the commissioners would have had authority to make a valid partition, which would have been binding on the other tenants in common. But there was no such request; there was a written consent to the allotment in exchange, after it had been made; but this is not what the 16th section of the General Inclosure Act contemplates, and the difference is one, not of form, but of substance. The meaning of the legislature was, that, at the request of one of several tenants in common, the commissioner should have power to make what *he* should consider a fair partition. *He* was intended to exercise *his judgment*. *His* decision was to bind the other parties, whether they consented or not, and whatever might be the extent of their interests. Now, nothing of *this sort* was done here. The commissioners do not profess, by their award, to have exercised any skill or judgment of their own in the division of the estate. The partition, if valid, must be so by the act, not of the commissioners, but of the parties by whose consent it was made; and certainly there was no consent of the parties entitled to the moiety not belonging to Spencer, except of Messrs. Chaffey, who were only tenants *pur autre vie*, and as such had no authority by the act to consent to a partition. This is a fatal objection to any partition the validity of which is to depend on the 16th section of the General Inclosure Act. But there is another ground of objection equally conclusive, if the allotment is to be considered merely as a partition; and that is, that one of the tenants in common is to take as his share in severalty a close of land, which, previous to the partition, formed no part of the land held in common, but was the separate property of the other tenant in common. This cannot be done on a mere partition. The allotment being, therefore, on both these grounds, bad as a par-

tition, it remains to consider whether it is good as an exchange.

The Local Act, sect. 31, authorises the commissioner to allot and award any lands or hereditaments in exchange for any other lands or hereditaments, provided such exchange be with the consent of the owners, whether as tenants in fee simple or for life.

Now, here the allotments in severalty were made with the consent of Spencer, the owner in fee of one moiety, and of Messrs. Chaffey, tenants pur autre vie, (that is, for the life of Thomas Knight,) of the other. We think that the words of the statute, "tenants for life," include tenants pur autre vie, and so that Messrs. Chaffey were enabled to give a valid consent to an exchange; and the only question, therefore, is, whether the transaction can be sustained, as coming within the description of what the act contemplated under the denomination of an *exchange*.

We think it may.

It certainly cannot be laid down, that in every case a partition can be effected by means of an exchange. It is essential to an exchange, properly so called, that it should be made between two parties only. "The things given and taken in exchange run in parallel lines, and cannot pass into three lines or a triangle:" per Curiam, in *Etonboll v. Bishop of Winchester* (a). So that, in no case of three or more coparceners or tenants in common, can a partition be made by means of an exchange. But, if A. and B. be tenants in common of Blackacre and Whiteacre, we can discover no principle which is to prevent A. from giving his moiety of Blackacre to B., in exchange for B.'s moiety of Whiteacre. In such a transaction all the requisites of a valid exchange are found, and the only old authority against its validity is a passage in the *Touchstone* (b), in which it is said that joint tenants, tenants in common, and coparceners, cannot exchange the lands they

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(a) 3 Wils. 497.

(b) Page 292.

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so hold with one another, before they have made partition. No reason is given for this proposition, and it is certainly not borne out by the passages in Perkins, to which reference is there made. Indeed, it may be doubted whether these passages are referred to as authorities for the doctrine in question; and in no other old authority have we been able to discover any warrant for what is laid down in the Touchstone. Mr. Preston, in his edition of the Touchstone, expresses an opinion that the position is wrong, for he asks, what objection is there to an exchange of one undivided moiety of part of the lands for an undivided moiety of other parts of the same lands, as between coparceners and tenants in common?—though, as between joint tenants, the unity of their seisin may prevent the operation of an exchange. The case of *M^{rs} Queen v. Farquhar*(a), relied on by the plaintiff's counsel, in argument, certainly shews Lord Eldon's opinion to have been, that a *power of exchange* in a settlement to be effected under the Statute of Uses, would not authorise a partition. And it seems, from Mr. Bell's note to *Abel v. Heathcote*(b), that Lord Eldon retained this opinion in the year 1820.

As a general proposition, it may be true that a power of exchange does not necessarily include a power to make partition in all cases: where, for instance, the partition is to be made among three or more parties, as was the case in *Abel v. Heathcote*; but it does not surely follow from thence, that, where there are only two parties, the exchange of a moiety of one part of the land held in common, for a moiety of the other, is to be considered bad, because it effectuates a partition. If we are right in holding, (contrary to what is said in the Touchstone,) that, at common law, two tenants in common may exchange with each other their respective moieties of the different parts of the land held in common, it must follow, where the

(a) 11 Ves. 475.

(b) 4 Bro. C. C. 277.

moiety of an estate is settled to uses, with a power of exchange in the trustees, that such a power may be well executed by dividing the lands into two portions to be held in severalty, one on the uses of the settlement, the other by the party entitled to the other moiety. If such a transaction would have been valid as the execution of a power under the Statute of Uses, à multo fortiori will it be good under the statutory power contained in this act of Parliament, the main and paramount object of which, as in all similar acts, was to enable the commissioners to make such a division and distribution of the lands in the parish as should best conduce to the future convenient enjoyment of the whole.

A point was made in argument, that the allotments made to Messrs. Chaffey and Arthur Spencer, in respect of their interests in the open land, were void, having been made after the death of Arthur, and when Edward his heir was the party entitled; but there is no weight in this, for it appears on the face of the award, that, though the allotment was made in the name of Arthur, who had sent in the claim, yet the commissioners understood the effect of it to be the same as if they had used the name of Edward. For, in the subsequent part of the award, as to the exchanges, they describe Arthur's moiety of the three allotments as being vested in Edward, which could only be because he took under the award in favour of Arthur.

In fact, the use of the name *Arthur* evidently arose from his having been the party who concurred with Messrs. Chaffey in making the claim, and is altogether immaterial as affecting the title.

On the whole, therefore, we are of opinion that the award correctly describes the allotments in question as an exchange and not a partition; and that, for the reasons we have already given, the exchange is perfectly valid, and so that the title of the lessor of the plaintiff was effectual. There must, therefore, be judgment for the defendant.

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In *Doe d. Knight v. Sansom and others*, the question is precisely the same, and in that case also our judgment must be for the defendant.

Judgment for the defendant.

STEVENS v. KEATING (a).

The specification of a patent for "a process or method of combining various materials so as to form stuccoes, plasters, and cements, and for the manufacture of artificial stones, marbles, &c. used in buildings," after stating the invention to consist in producing certain hard cements of the combination of the powder of gypsum, powder of lime-stone, and chalk, with other materials, such combinations being (subsequent to their mixing) submitted to heat, described the method or process of making a cement from gypsum, to consist in mixing with powdered gypsum strong alkali (ex. gr. best American pearlash) dissolved in a certain proportion of water, this solution to be neutralised with acid (sulphuric acid being the best), the mass to be kept in agitation, and the acid to be added gradually till the effervescence should cease; and then a certain proportion of water to be added (if other alkali were used, the quantity to be varied in proportion to its strength); and the mixture having been brought to a proper consistence by the further addition of powdered gypsum, to be dried in moulds, and finally subjected to a furnace capable of producing a red heat. The description of making the cement differed little from that of the preceding process.

The specification, after proceeding to state the mode of using the cement so made, concluded by stating, that other alkalies and acids besides those before mentioned would answer the purposes of the invention, though not so well, and that the inventor claimed the method or process thereinbefore described:—*Held*, that the specification was bad; for that either the inventor claimed *all* acids and alkalies, or only those which would answer the purpose; in the former of which cases, as some acids and alkalies would not answer the purposes of the invention, the specification was therefore bad; and in the latter, it was bad for not specifying those acids and alkalies which would be found to succeed.

(a) This case was determined in Trinity Term (May 31).

also, with nominal damages, if the Court should think otherwise.

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The *Attorney-General*, in Hilary Term last (January 13), moved accordingly.

Cur. adv. vult.

The pleadings and the nature of the question sufficiently appear from the judgment of the Court, which was now (May 31) delivered by

POLLOCK, C. B.—This was an action for infringing two patents granted to one Richard Freen Martin. The first was dated the 8th of October, 1834, and was for “a certain process or processes, method or methods, of combining various materials, so as to form stuccoes, plasters, or cements, and for the manufacture of artificial stones, marbles, and other like substances used for buildings, decorations, or other similar purposes.”

The second was dated the 2nd of June, 1840, and was for “certain improvements in the manufacture of certain descriptions of cement;” being, in fact, an improvement on the first patent. Both the patents were assigned to the plaintiff on the 9th of December, 1843.

The declaration was in the usual form, the first count being on the first patent, the second on the second.

The defendant pleaded, first, not guilty; secondly, that Richard Freen Martin was not the true inventor of the invention in the first count mentioned; thirdly, that the invention in the first count was not a new invention; fourthly, that the said invention was not specified; fifthly, that it was not an invention for a new manufacture for which letters-patent could be granted. The sixth, seventh, eighth, and ninth pleas were pleaded to the second count, and were similar to the second, third, fourth, and fifth pleas to the first count. To these pleas there was the usual replication. At the trial, the patents, the specification, and

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the assignments were proved, but the second count was given up, and no evidence was offered of any infringement of the second patent. The important part of the first specification was as follows:—

“My invention consists in producing certain hard cements of combinations of the powder of gypsum, of powder of limestone, and of the powder of chalk, with other matters or materials; such combinations, when produced according to my invention, being (subsequently to their mixing) submitted to the action of heat, as will be hereafter fully described, whereby cement so produced will become highly useful as stucco or plaster, and for manufacturing of artificial stones, marble, and other like substances used in buildings, decorations, or similar purposes. In order that my invention may be fully described and carried into effect, I will proceed to describe the methods or processes which I have pursued and found to answer, and are the best I am acquainted with. *First*, for a cement from gypsum, I take any quantity of gypsum, which I reduce to a fine powder, either by grinding or by the ordinary methods pursued for the manufacture of plaster of paris of commerce; or I take any quantity of moulds, or other articles which have been formed of plaster of paris, and reduce them by the action of heat and grinding or crushing (or only grinding or crushing) into fine powders, similar to plaster of paris. With the above described plaster of paris I mix a solution of the following matters or materials:—Dissolve one pound of strong alkali (for instance, best American pearlash) in one gallon of water; this solution is to be neutralised with acid (sulphuric acid is best for the purpose), keeping the solution in agitation, and adding the acid gradually until effervescence ceases; then add the additional quantity of seven gallons of water, making in the whole eight gallons (if other alkali is used, then the quantity must be varied in proportion to its strength), which are to be mixed with a quantity of the powder till the same is of a consistence or state suitable to be cast or

moulded, as the case may be, into cakes, bricks, or other forms, which are to be permitted to dry, and then submitted to such degrees of heat in reverberatory furnaces, kilns, iron retorts, such as are used in gas-works, or such other means as will bring them to a red heat throughout; if the above materials be not heated red throughout, such parts as are not sufficiently burned will be ultimately less hard and durable than the cement properly burned. The solution necessary for admixture is about half the measure of the powder so treated. *Secondly*, for a cement from lime-stones and chalk, I take any quantity of lime-stone or chalk, which I grind or subject to the usual process of burning or calcination to lime; and, if by the latter process, reduce this lime to powder, either by exposure to air or by the application of water, in the ordinary way in which limes are slacked (air slacking is best), and treat it with solution of alkali and sulphuric acid in the manner described for plaster of paris; but, as it requires less fluid for admixture, the solution must be proportionably stronger. —Dissolve one pound of alkali (best American pearlash) in one gallon of water, which neutralise with sulphuric acid in the manner described for plaster of paris; then add the additional quantity of four gallons and two quarts of water, making in the whole five gallons and two quarts. Work up the solution with the powdered lime into cakes, and, when dry, burn them after the method directed for gypsum cement. The solution necessary for admixture is about one-third of the measure of lime powder so treated; if powder of gypsum, or powder of lime-stones, or chalk, are used uncalcined, then calcination must be made as regards the strength of the liquid in reference to the less quantity required for the purpose. The solution of alkali, without the addition of the acid, may be used for the manufacture of a cement from powder of gypsum, provided the subsequent burning be adopted, but which cement will not be so good as those made by the other methods de-

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scribed. Cements may also be made from the powder of lime-stones and chalk with the solution of acid—say, one quarter of a pound of sulphuric acid dissolved in four gallons of water, and afterwards burned as before described; but cements so made will not be so good as those made by the other methods described. The processes of incorporation and burning, both for this and alkali cement from gypsum, are the same as previously described.”—After describing the manner in which the cement is to be used, the specification concludes:—“And whereas other alkalies and acids, besides those hereinbefore mentioned, will answer the purposes of my said invention, though none that I have tried have answered so well as the alkali and acid hereinbefore set forth; and whereas I claim as my invention the processes of mixing the powdered materials, alkalies, and acids, as hereinbefore described, and subsequently burning, heating, or calcining the same, for the purposes hereinbefore set forth, &c., I do declare this to be my specification,” &c.

Evidence was given of the utility of the plaintiff's invention, and that the defendant used borax, which is a salt—the combination of an acid with an alkali—in making his cements: this, it was contended, was an infringement of the first patent, borax being composed of an acid and an alkali. At the close of the plaintiff's case, it was contended, first, that there was no evidence of any infringement of the patent at all; secondly, that the specification of the first patent was bad in point of law. As to the first point, leave was reserved to enter a verdict for the defendant on the issue of not guilty to the first count, if the Court should be of opinion that there was no evidence of infringement of the first patent by the defendant. The second point was fully argued. At the conclusion of the argument, I decided that the first specification was bad in point of law, and directed the jury to find for the defendant upon the issue to the fourth plea. In the ensuing term,

the *Attorney-General* moved for a new trial, and we have now to decide whether the specification to the first patent is good in point of law or not.

The title of the patent is for "A process or processes, method or methods, of combining various materials, so as to form stuccoes, plaster, or cements, and for the manufacture of artificial stones, marbles, and other like substances."

The specification states the invention to consist in producing certain hard cements of the combination of the powder of gypsum, powder of lime-stone, and chalk, with other materials, such combinations being (subsequent to the mixing) submitted to heat. The specification then states the method of making cement from gypsum, in the course of which alkali is to be used, and is to be neutralised with acid (it is stated sulphuric acid is best for the purpose); the result is to be subjected to some furnace, which will produce a red heat. The method of making cement from lime-stones and chalk is then described, which does not materially differ from the other process—which seems to consist in the use of acid afterwards neutralised by alkali, and subjected to heat. The specification then states the mode of using the cement, and concludes as usual with the claim as "above stated;" and the question is, whether this is a good specification. It is the same question as if the plea had been merely the general issue under the old mode of pleading, and the question had been, whether the plaintiff was entitled to succeed. The question is, whether the specification be good or not: only one alkali (potash) and one acid (sulphuric) are mentioned in the specification; but manifestly the inventor does not confine himself to these; if he did, the defendant would be entitled to a verdict on the plea of not guilty, for he has used neither. To what extent, then, does the claim of the plaintiff go beyond the alkali and acid named? It must either be a claim of all acids and alkalies, or of all acids and alkalies that will answer the purpose. If it be a

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claim of all acids and alkalies, it is clearly bad, as there are some that will not answer the purpose. If it be a claim of those only which will answer the purpose, it is as clearly bad, in consequence of not stating those which will answer the purpose, and distinguishing them from those that will not, and so preventing the public from being under the necessity of making experiments to ascertain which of them will succeed and which will not; and this was expressly so determined by the Court of Queen's Bench, in *Rex v. Wheeler* (a), where they say, that a specification, which casts upon the public the expense and labour of experiment and trial, is bad. In any view, therefore, this specification is defective, and we think there ought to be no rule.

Rule refused.

(a) 2 B. & Ald. 35, n.

June 21.

HORSFALL v. THOMAS HEY.

"Memorandum, that T. has sold to G. all the goods, stock-in-trade, and fixtures in a certain shop."—*Held*, to require an ad valorem stamp as a conveyance.

Any instrument which operates as a record of the transfer of property is a conveyance within the Stamp Act.

TROVER for goods, chattels, and effects.—Pleas, not guilty and not possessed.

At the trial, before *Alderson*, B., at the York Spring Assizes, 1848, it appeared that the conversion relied on was a sale of the effects in question; and, in order to prove it, the plaintiff gave in evidence the following document:—"Memorandum.—That Mr. Thomas Hey *has sold* to G. Hey all the goods, stock-in-trade, and *fixtures* in the shop of Walter Hey, at &c., for 90*l*." This document was signed by both parties, and bore an agreement stamp. It was objected, on behalf of the defendant, that the document operated as a conveyance, and ought, therefore, to have borne an ad valorem stamp of 1*l*. 10*s*. The learned judge directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a nonsuit. A rule nisi having been obtained accordingly,

Knowles shewed cause.—The instrument in question is in no sense a conveyance, but a mere memorandum of a past transaction. In order to come under the head “Conveyance,” in the schedule of the Stamp Act, 55 Geo. 3, c. 184, the instrument must purport on the face of it to convey. That act imposes a duty “for and in respect of the principal or only deed, instrument, or writing, *whereby* the lands or other things sold shall be granted, leased, assigned, &c., or otherwise conveyed to or vested in the purchaser.” Unless, therefore, the terms of the instrument are such that *eo instanti*, upon and by force of its execution, the property is divested from the one party and vested in the other, it is not a conveyance within that act. Here the sale and purchase might have taken place by oral agreement; and if this instrument be held to be a conveyance, no agreement for the sale of goods, wares, and merchandise, would be within the exemption of the Stamp Act. If the word “fixtures” had not been introduced, there could have been no doubt upon the subject; but the question, whether certain terms do or do not amount to a conveyance, cannot depend upon the subject-matter in respect of which the parties are dealing. Besides, the word “fixtures” does not necessarily mean something attached to the freehold, but it may designate goods to be afterwards fixed. If, however, the term be construed in its strict sense as something fixed to and in contemplation of law part of the freehold, this instrument could not operate otherwise than as an agreement, since it is not under seal, and, therefore, incapable of passing the legal estate in the freehold. [*Parke, B.*—How, if that were the case, would a sheriff be justified in seizing fixtures? It is correctly laid down, in “*Amos on Fixtures*” (a), that, “for the benefit of creditors, fixtures are considered to be so far in the nature of personal chattels, that in certain cases they may be seized

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(a) Page 321, 2nd edit.

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and removed under a writ of fieri facias.”] This instrument does not shew any intention in the parties to pass the property by it. In *Wick v. Hodgson* (a), the question arose upon a memorandum given on the sale of fixtures by an outgoing to an incoming tenant. In *Pitt v. Shaw* (b) it was held, that fixtures might be recovered under the terms “goods, chattels, and effects.” In *Thompson v. Pettitt* (c) the instrument clearly authorised the party in whose favour it was made to enter the premises and sell the fixtures.

Martin, in support of the rule.—According to the argument on the other side, the stamp duty on conveyances might be avoided by using language in the past tense. The word “memorandum” at the commencement does not render the instrument the less a conveyance, but means simply, “let it be recorded.” In *Jones v. Ryder* (d), *Parke*, B., says, “that every instrument ought to be stamped according to its legal effect.” This instrument comes within the definition of a bargain and sale; for it is an agreement whereby one person, for a valuable consideration, transfers effects to another. “The very words bargain and sell are not necessary to a good bargain and sale:” (*Shep. Touchst.* c. 10, p. 222); and in *Co. Litt.* 301. b. it is said, “And he to whom such a deed, comprehending dedi &c., is made, may plead it as a grant, as a release, or as a confirmation, at his election.” [He was then stopped by the Court.]

PARKE, B.—The question is, whether this instrument operates as a conveyance within the meaning of the Stamp Act, 55 Geo. 3, c. 184. The schedule of that act prescribes an ad valorem duty on every “conveyance, whether grant, disposition, lease, assignment, transfer, release, renunciation, or of any other kind or description whatsoever, upon

(a) 12 Moore, 213.

(b) 4 B. & Ald. 206.

(c) 10 Q. B. 101.

(d) 4 M. & W. 35.

sale of any lands, tenements, rents, annuities, or other property, real or personal, heritable or moveable, or of any right, title, interest, or claim in, to, out of, or upon any lands, tenements, rents, annuities, or other property, (that is to say), for or in respect of the principal or only deed, instrument, or other writing, whereby the lands or other things sold shall be granted, leased, assigned, transferred, released, renounced, or otherwise conveyed to or vested in the purchaser." Those are very comprehensive words, embracing not only a transfer of all kinds, but every right of property. This instrument contains words in the past tense, but that can make no difference, if the instrument itself operates as a conveyance. It is laid down in Sheppard's Touchstone (which is the language of Mr. Justice *Dodderidge*, and entitled to the utmost respect as one of the first authorities in the law), "that the best way in grants is to grant by words in the present tense, as well as in the preterperfect tense; but a grant by words of the preterperfect tense only, as by *dedi et concessi* only, without words of the present tense, is good." Therefore, if this instrument is meant to be a record of a transfer, it is a conveyance and transfer of property within the meaning of the statute. It has been ingeniously argued, that, if we adopt that construction, and hold this instrument to operate as an immediate conveyance of the property, no agreement for the sale of goods, wares, and merchandise, would be within the exemption of the Stamp Act. That made me pause, because, if it were so, all bought and sold notes would require to be stamped, and that would create great confusion in the mercantile world. The result, however, would not be as contended. Under the head "Agreement," there is an exemption, not merely from the preceding stamp duty, but from all other stamp duty, of any "memorandum, letter, or agreement, for or relating to the sale of goods, wares, and merchandise." Then this instrument, being a conveyance relating to the sale of goods, would

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have been within the exemption and required no stamp, if it did not also embrace the transfer of fixtures. The plaintiff's counsel argued, that, so far as related to the fixtures, it could only operate as an agreement, that in future the party should exercise some power of removal, and that, until that power was exercised, it was wholly inoperative to transfer the property. But the case of *Thompson v. Pettitt* shews that it operates as a conveyance at the instant of the right and title to the fixtures, that is, to such things as a tenant might remove, and, moreover, that it gives such a property in the chattels that the owner might bring trespass against any person who afterwards removed them. This instrument, though it uses words in the past tense, is the record of an agreement between the parties, that from its date the purchaser shall have full right of removing the fixtures; and it is a transfer, and not an instrument within the exemption as to goods, wares, and merchandise. If an act of Parliament had said, that in future no fixtures or stock-in-trade should be transferred except by writing, this instrument would satisfy the statute; and if so, it is a transfer under the Stamp Act. Were we to hold, that, whenever parties use the past tense, the instrument must be construed as a mere memorandum, we should be opening a door for exempting all conveyances from stamp duty.

ALDERSON, B., concurred.

ROLFE, B.—The fact of the instrument being in the past tense, amounts to nothing; for when parties execute a deed, they write, "In testimony whereof the parties hereunto have set their hands and seals."

PLATT, B., concurred.

Rule absolute.

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BLACKBURN and Others v. SMITH.

July 11.

ASSUMPSIT.—The first count of the declaration stated, that, by a certain agreement in writing, dated the 10th of December, 1844, between the defendant of the one part, and the plaintiffs of the other part, and signed by the plaintiffs and defendant respectively, it was witnessed (amongst other things), that, in consideration of the sum of 18*s.* 6*d.* for every square yard of land, which the land thereafter described should, on admeasurement, be found to contain, to be paid as thereafter mentioned, the defendant agreed to sell to the plaintiffs, and the plaintiffs agreed to purchase, all the piece of land in the said memorandum of agreement particularly described; and the plaintiffs thereby agreed to pay unto the defendant the sum of 150*l.*, part of the purchase-money for the land, on the signing of the memorandum of agreement, and the remainder of the purchase-money on or before the 2nd of December, 1846, and also to pay the defendant interest on the balance of the purchase-money, at the rate of 4*l.* per cent. per annum, to commence from the 2nd of June then next, by equal half-yearly payments in each year, the first of such payments to be made on the 2nd of December, 1845: and the de-

By agreement in writing, the defendant agreed to sell, and the plaintiff to purchase, a piece of land, and to pay part of the purchase-money down, and the remainder on a future day; and it was agreed that the plaintiff should have immediate possession, and that the defendant should furnish the plaintiff with a full and sufficient abstract of title to the land, and, upon payment of the balance of the purchase-money, a conveyance of the fee-simple should be made: that all objections to, and requi-

sitions in support of, the title, not delivered in writing in a month after the delivery of the abstract, should be deemed to be waived. The plaintiff paid the deposit, and took possession of the land. The defendant, in due time, delivered an abstract, containing a statement of all the deeds, &c., in his custody, power, or knowledge, but tracing the title for a period less than sixty years, and shewing it to be in a trustee. No objection was made within the month. Afterwards the trustee died intestate; and it not appearing in whom the legal estate vested, the plaintiff gave notice that he rescinded the contract, and brought an action to recover back the deposit, and, in one count of the declaration, declared specially on the agreement, and assigned as a breach the non-delivery of a "full and sufficient abstract" of the defendant's title to the land, which was traversed by a plea. The second count was for money had and received:—*Held*, that, no objection having been made within the month, the issue was satisfied by the abstract delivered, it having been a full and fair statement of all the muniments which the defendant had in his possession, power, or knowledge, and a fair statement of the deduction of his title, though it did not go back sixty years.

Also, that the plaintiff could not rescind the contract and recover the deposit under the count for money had and received, inasmuch as, having taken possession of the land, the parties could not be placed in *statu quo*.

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fendant thereby agreed, that the plaintiffs should have immediate possession of the said land; and forthwith, at his own expense, to furnish the plaintiffs with a full and sufficient abstract of the title to the said land; and that, upon payment of the balance of the purchase-money and interest, a good and valid conveyance of the fee-simple and inheritance of the said land, free from incumbrance, should be made and executed to the plaintiffs, their heirs or assigns, or as they should direct, by the defendant and all other proper and necessary parties, such conveyance to be prepared by and at the expense of the plaintiffs: and it was further agreed, in and by the said memorandum of agreement between the parties thereto, that the costs of all attested official and other copies of, or extracts from, any writings required to accompany the title, should be paid by the plaintiffs; and that all objections to, and requisitions in support of, the title, not delivered in writing within one month after delivery of the abstract, should be deemed to be waived, and the non-delivery of any objections within that time should be an acceptance of the title: Provided always, and it was thereby agreed, that, in case there should be any restrictions in the title which should prevent the plaintiffs from building a school-house, and carrying on a day-school on the said land, the plaintiffs should be at liberty to vacate the said contract, and, in that case, the deposit should be returned to them: and it was thereby agreed between the parties thereto, that, in case default should be made in payment of the balance of the purchase-money, or the interest thereof, at the times thereinbefore appointed for payment thereof, it should be lawful for the defendant, his heirs, executors, or administrators, whenever and in such manner as he or they should think fit, to re-enter and repossess the said land, and all buildings thereon made by the said purchasers, and to re-sell the same, or any part thereof, at such price as he might think a fair value for the same, and convey the part or parts sold

to the purchasers thereof, his, her, or their heirs or assigns, as he, she, or they might direct; and that all such sales should be valid and binding on the plaintiffs and their heirs or assigns; and that the receipt or receipts of the defendant should be a sufficient discharge for so much of the purchase-money as should be therein expressed to be received: and the plaintiffs thereby agreed, that the defendant should stand possessed of the said purchase-mones, in trust to pay off the expenses of such sale or sales as aforesaid, and all charges incident thereto, and the balance of the said purchase-money and interest then due to him, and to pay the surplus monies, if any, to the plaintiffs, their executors and administrators.—The count then alleged mutual promises, and contained averments of the payment of the deposit of 150*l.*, of the plaintiffs' readiness to perform their part of the agreement, and the lapse of a reasonable time; and assigned as a breach, that the defendant did not nor would forthwith, nor within such reasonable time as aforesaid, although he was then, and at and within such reasonable time as last aforesaid, to wit, on the 1st of September, 1846, requested by the plaintiffs so to do, at his own expense, or otherwise, furnish the plaintiffs with a full and sufficient abstract of the title of him, the defendant, to the said land; but he the defendant then wholly neglected and omitted so to do, and hath not ever furnished the plaintiffs with a full or sufficient abstract of title as aforesaid.—There was also a count for money had and received.

Pleas,—non-assumpsit to the whole declaration; and to the first count, that the defendant did forthwith, to wit, on &c., furnish the plaintiffs with a full and sufficient abstract of title. Upon which issues were joined.

At the trial, before *Rolfe*, B., at the Liverpool Spring Assizes, 1848, it was proved that the parties entered into the agreement, which was dated the 10th December, 1844, and that the plaintiffs then paid to the defendant the deposit of 150*l.* The land, which was described in the agree-

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ment as situate on the north side of Upper Queen Street, Liverpool, was a plot of building land lying waste and uninclosed; and the plaintiffs so far took possession of it as to put up a board containing a notice that the land was for sale, and referring applicants to them. In February, 1845, the defendant delivered to the plaintiffs an abstract of title in two parts, one containing the title of T. Webster to some freehold and copyhold land. The title to the copyhold was traced down from 1766 to 1816, when the copyhold was enfranchised. The abstract did not disclose any title to the freehold anterior to 1816. Reference was made to a map or plan of the land in one of the deeds abstracted. The other part of the abstract shewed an agreement by one Forshaw, therein described as the surviving devisee of T. Webster, to sell to the defendant part of the same land, corresponding with that mentioned in the agreement between the plaintiffs and defendant. The abstract did not disclose any evidence of the deaths of the co-trustees of Forshaw. No objection, in writing or otherwise, was made within a month after this abstract was delivered. In October, 1845, Forshaw died, having made his will; and it was supposed that the legal estate was in his devisee. It appeared, however, on investigation, that the will did not dispose of his trust property; and some difficulty arose in tracing his heir-at-law. The conveyance was in consequence delayed; and in January, 1847, the plaintiffs formally gave notice that they rescinded the contract, and demanded back the purchase-money. It was contended on behalf of the plaintiffs, that the defendant had not delivered a "full and sufficient" abstract of title, and that they were entitled to recover back the deposit of 150*l.* under one or other of the counts. On the part of the defendant it was contended, that the plaintiffs could not rescind the contract, as they had taken possession of the land. The learned judge was of opinion, that the agreement imported only that the defendant should

deliver an "abstract of such title as he had at the time," and his lordship directed a verdict for the defendant, reserving leave for the plaintiffs to move to enter a verdict for them.

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Baines, in last Easter Term, obtained a rule nisi accordingly; against which

Crompton shewed cause (June 26).—First, the breach alleged in the first count is the non-delivery of a full and sufficient abstract of title. That means a full and sufficient abstract at the time of its delivery. This abstract traced the title down to Forshaw, and it then shewed that Forshaw contracted with the defendant to sell him part of the land corresponding with that mentioned in the agreement. No objection is made within the month, and the subsequent death of Forshaw could not render the abstract imperfect, if it were sufficient at the time of its delivery. [*Parke*, B.—The terms, "full and sufficient abstract of title," cannot mean "a full and sufficient *marketable* title," otherwise there would be no reason for the stipulation requiring all objections to be taken within the month. *Platt*, B.—The parties provide, that, if no objection is made within the month, the vendees are to be deemed to have accepted the title; that must mean an objectionable title.] If the plaintiff had shewn that the documents were not truly abstracted, or that they did not apply to the land in question, or that they were not the whole of the muniments in the defendant's possession, or any similar defect, the case might have been different; but this agreement is satisfied by the delivery of an abstract identifying the estate, and comprising all the documents in the defendant's possession, power, or knowledge, with a full history of the births and deaths of the material parties, and other facts, so as fairly to deduce the title.

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Secondly.—The plaintiffs cannot recover on the count for money had and received. It is well established, that a deposit cannot be recovered back under that count, unless the contract has been put an end to, and the parties placed in statu quo: *Hunt v. Silk*(a). Where the vendee has taken possession, he must declare specially on the contract. Here part of the consideration was, that the plaintiffs should have possession, and they have enjoyed some of the mesne profits, for they have had the power of selling or endeavouring to sell the land. It may be difficult to compute the value of the plaintiffs' occupation, but *something* must be deducted from the amount of the deposit. [Parke, B.—Whether it was of value to the plaintiffs or not, at all events, the defendant has been deprived of the use of the land.]

Bird and Atherton, in support of the rule.—First, a “full and sufficient abstract” of title must shew the quantity and quality of the estate, and in whom vested, tracing the title for sixty years, so that the purchaser may be able to prepare the conveyance; and, in addition, the vendor must prove that the abstract is true: *Cooper v. Emery*(b), *Wynne v. Griffith*(c). This abstract shewed no title to the freehold land anterior to 1816. [Parke, B.—No doubt that is a defect in the title, as disclosed on the abstract, but is it one in the abstract? With such a stipulation as this agreement contains, it is clearly unnecessary to make an unobjectionable title on the face of the abstract; but the question is, what is the limit the other way?—must the vendor disclose a colourable title for sixty years?] He is bound to do so, in order to comply with the term “sufficient abstract” of title. [Alderson, B.—A vendor must truly, fairly, and in all material parts abstract the title which he possesses, and must shew, by good and sufficient evidence,

(a) 5 East, 449.

(b) 1 Ph. 388.

(c) 1 Russ. 283.

that the abstract is true, and that being true it gives a good title. But all that is necessary in the first instance, in order to make a good and sufficient title, is to state truly, and in all material parts abstract, the title which the vendor has. *Rolfe, B.*—The term “full and sufficient abstract,” means full and sufficient abstract of such title as the vendor possesses.] This is not a perfect abstract of the title which it purports to shew, for it does not disclose in whom the legal estate vested on the death of Forshaw: *Wynne v. Griffith (a)*. If the stipulation as to a full and sufficient abstract had stood alone, it could hardly be contended that there was any compliance with it. Then, to what extent is the general qualification to be restrained by the subsequent provisions? The Court will, if possible, so construe the contract as to give effect to every part of it. If the construction contended for on the other side is to prevail, the subsequent stipulations in the agreement would be rendered nugatory; for the vendor might deliver an abstract alleging any sort of colourable title, and in the absence of objection within the prescribed period, the purchaser would be bound to accept it. [*Platt, B.*—The abstract may be sufficient, though the title is defective. *Rolfe, B.*—Suppose a title is traced down to A. B., and then it is shewn that A. B. died intestate and unmarried, and that the vendor took possession as his illegitimate son, that would be a bad title, but a perfectly good abstract. If a vendor fairly abstracts the whole title on which he relies, how can he do more?] A full and sufficient abstract of title means a perfect abstract of a marketable title, and the non-delivery of such an abstract absolved the plaintiffs from the obligation of making objections within the stipulated time: *Tanner v. South (b)*. [*Parke, B.*—In that case the question was, whether the objections were delivered within the stipulated period of ten days, and that depended

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(a) 1 Russ. 283.

(b) 4 Jur. 810.

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upon whether the last day was to be reckoned inclusive or exclusive—no doubt the latter.]

Secondly.—The vendee had a right to rescind the contract. [Parke, B.—How can he rescind when he has had possession of the land? There can be no rescission of the contract, unless the parties can be placed in statu quo.] The mere taking possession is immaterial, unless it appears quo animo it is done. The period for the completion of the purchase being a distant day, it was arranged that the plaintiff should have immediate possession; but the parties could never have intended by that to waive their rights. In *Hunt v. Silk*, the lessee continued in possession after the expiration of the period for the completion of the contract.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—In this case an action was brought by the plaintiffs, the purchasers, on a contract by the defendant for the sale of some land near Liverpool. The agreement stipulated that the plaintiffs should have immediate possession, should pay part of the purchase-money down and the balance afterwards, and that the defendant should furnish the purchasers with a full and sufficient abstract of the title to the said land; and, on payment of the balance of the purchase-money and interest, a good and valid conveyance of the fee-simple and inheritance, free from incumbrance, should be made and executed to the purchasers by the defendant and all other proper and necessary parties, such conveyance to be prepared at the expense of the purchasers; and it was agreed that all objections to and requisitions in support of the title, not delivered in writing in a month after the delivery of the abstract, should be deemed to be waived, and the non-delivery of objections in that time should be deemed an

acceptance of the title. The breach assigned in the special count of the declaration was the non-delivery of a full and sufficient abstract, and that allegation was traversed. There was also a count for money had and received, to which the general issue was pleaded.

It appeared on the trial, before my brother *Rolfe*, at Liverpool, that an abstract of the title of the defendant was delivered in due time, in two parts, one containing the title of Thomas Webster to some freehold land and some copyhold, enfranchised in 1846, and another, containing an agreement by one Forshaw, therein represented as surviving devisee of Webster, to sell to Smith, the defendant, part of the same land, corresponding with that mentioned in the agreement between the plaintiffs and defendant. It was not alleged that these abstracts did not contain a statement of the contents of all the deeds and instruments in the defendant's custody, power, or knowledge; but it was contended, notwithstanding, that the abstract was insufficient. My brother *Rolfe* thought it was not, and directed a verdict for the defendant, reserving the point, which was argued before us fully by Mr. *Crompton* and Mr. *Bird*.

It was not disputed, that in this agreement the terms "full and sufficient abstract of the title," did not mean a full and sufficient abstract of a *complete marketable title*, for the context shewed that the parties contemplated an abstract to which objections might be made. The defendant contended, that, if the abstract identified the estate, and comprised all the documents he had in his possession, power, or knowledge, and a full history of the births and deaths of the material parties, and other facts to shew the deduction of title to himself, or a trustee for himself, it was as full and sufficient as the agreement required.

The plaintiffs insisted that this was not enough: that it ought to contain a reasonably accurate description of the

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property, and a statement of a *sixty years' title* to the freehold, which would in this case include the lord's title to the manor whereof the copyholds were held; and further, that the vendor must prove the statements to be true, by proper evidence; which last proposition was not disputed; but this was said, and truly, to belong, not to the abstract, but to a subsequent stage of the investigation of the title.

We think the abstract was sufficient, within the meaning of this issue, as it must be taken to have been a full and fair abstract of all the muniments which the defendant had in his possession, power, or knowledge, and a fair statement of the deduction of his title, though it did not go back for sixty years. Whether an abstract containing less than what this did would have been sufficient under this contract, it is unnecessary to say.

The want of an abstract of the title to the manor before 1816 would have been a good objection, if made within a month, but not having been so made, it was waived. And with respect to the identity of the land, we think that the abstract referring to a map or plan in one of the deeds abstracted, affords sufficient means of identification. We are not aware that a map or plan is ever deemed to be necessary as a part of an abstract. We are therefore of opinion that the breach alleged was not proved, and that my brother *Rolfe's* opinion was correct.

Further, we think, on the principle of the case of *Hunt v. Silk*, inasmuch as the plaintiffs had the possession of the property, and the parties could not be placed in statu quo, the count for money had and received cannot be maintained, supposing that the defendant had been guilty of a breach of contract subsequent to the delivery of the abstract. We have not now to decide whether such a breach has been committed. If it was, the plaintiff's remedy is on the contract.

Rule discharged.

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TURNBULL v. PELL.

DEBT for money had and received, and on an account stated.

Plea—That the plaintiff, before and at the time of the commencement of the suit, was and still is indebted to the defendant in 149*l.* 14*s.* 6*d.*, upon and by virtue of a judgment theretofore recovered in the Court of our Lady the Queen, before the Barons of her Exchequer at Westminster, against the plaintiff, in a certain action wherein the now defendant was plaintiff, and the now plaintiff defendant, as by the record and proceedings thereof still remaining in the said Court of our Lady the Queen, before the Barons of her Exchequer at Westminster, more fully appears, and which he the defendant is ready to verify by the record; and in 43*l.* 12*s.* on a promissory note, made on &c., by the plaintiff, &c.; and in 500*l.* for work done by the defendant for the plaintiff, and for money lent, money paid, money had and received, and for the forbearance of money due upon an account stated; and which said several sums exceed the debt above demanded and damages, and out of which said monies the defendant hereby offers to set off and allow to the plaintiff the full amount of the said last-mentioned debt and damages.—Verification.

Replication—That the plaintiff was not nor is indebted to the defendant in manner and form as alleged, by reason that, as to certain part of the said supposed debts in the plea mentioned, to wit, 149*l.* 14*s.* 6*d.*, there is not any record of the said recovery in manner and form as alleged; and this the defendant is ready to verify, when, where, and in such manner as the Court here shall appoint; and by reason that, as to the residue of the said debts other than the said sum of 149*l.* 14*s.* 6*d.*, the plaintiff was not

To debt for money had and received, &c., the defendant pleaded, by way of set-off, that the plaintiff was indebted to him in 149*l.* 14*s.* 6*d.*, upon a judgment recovered in the Court of Exchequer, which the defendant was ready to verify by the record, and in 43*l.* 12*s.* on a promissory note, and in 500*l.* for work and labour, money lent, &c. The plaintiff replied, that he was not nor is indebted, by reason that, as to 149*l.* 14*s.* 6*d.*, there was not any record of the said recovery, and that he was ready to verify, when, where, and in such manner as the Court should appoint; and by reason that, as to the residue other than the said sum of 149*l.* 14*s.* 6*d.*, the plaintiff was not indebted to the defendant; concluding to the country:—

Semble, that the plea and replication were both bad.

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nor is indebted to the defendant in respect of the said residue or any part thereof, in manner and form as already alleged; concluding to the country.

Special demurrer, assigning for causes (amongst others), that the plaintiff by his replication refers matter to the Court to be tried by the record, which ought to be tried by the country; that the replication, being entire and indivisible, contains a verification by the record, and also a prayer that the matter thereof may be inquired of by the country, so that the defendant cannot take any one single and certain issue thereupon; and that the replication contains two separate and distinct answers and replications to the said plea. Joinder in demurrer.

Barstow argued in support of the demurrer (June 9)—The chief objection to the replication is, that by dividing the subject-matter of the plea, and making two modes of trial, it places the defendant under difficulty in accepting any issue. With regard to the first portion of the plea, if the plaintiff rested his case upon the circumstance of there being no such record, he might have prevented the plea from being received. In a note to the case of *Pitt v. Knight* (a) it is said, "If a record of the same count be pleaded, formerly the plaintiff might pray oyer of the record, and if it were not given him the *next day*, the Court would reject the plea: *Theobald v. Long* (b), *Creamer v. Wickett* (c), *Hunter v. Wiseman* (d). But now, since the practice has been to refuse oyer of records, it is questionable whether this method can any longer be enforced; and therefore, at present the way is to demand a note in writing of the term and number of the roll whereon the judgment or other matter of record so pleaded is entered and filed, and if the defendant's

(a) 1 Wms. Saund. 92 a.

(b) Carth. 453; 1 Ld. Raym. 347.

(c) Carth. 517.

(d) 2 Str. 823.

attorney neglects or refuses to give the same to the plaintiff's attorney, such plea is not to be received." A plea of set-off by reason of a judgment is not proved by the production of the record, but the defendant must also shew the identity of the parties, and that the debt remains unsatisfied. [*Alderson*, B.—The jury have to try whether the one debt is greater than the other; how can that be known until there is a finding on the issue of nul tiel record?] The plaintiff might have replied "nunquam indebtedus," concluding to the country, for that is the proper conclusion where matter of law is mixed with matter of fact. *Briscoe v. Hill* (a), and *Fairthorne v. Donald* (b) are authorities to shew that this replication is bad. [*Alderson*, B.—The plaintiff in effect says, that he is not indebted, and he accepts the mode of proof which the defendant offers. The difficulty is of your own seeking. I agree that the second issue raised by the replication is an immaterial issue, for it would only determine whether the debt was due, not whether it exceeded the other debt. Suppose the defendant proved on the second issue 20*l.*, and the plaintiff proved 150*l.*,—which way is the verdict to be entered? It would be desirable that the replication should be amended, so as to leave no doubt as to the entry of the verdict.]

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The case then stood over for further argument, but in the mean time the parties consented to make the following amendments:—The defendant pleaded, secondly, as to 149*l.* 14*s.* 6*d.*, parcel of the monies in the declaration mentioned, a judgment recovered for that amount, concluding with a verification by the record, and an averment that the sum equalled the sum of 149*l.* 14*s.* 6*d.* in the declaration mentioned. He then pleaded, thirdly, to the damages for the detention of the said 149*l.* 14*s.* 6*d.*, and to the residue of the declaration, the remaining matters stated in

(a) 10 M. & W. 735.

(b) 13 M. & W. 424.

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the plea of set-off, concluding with a verification. The plaintiff replied to the second plea, *nul tiel record*, with a verification by the record, when, where, and in such manner as the Court should appoint; and to the third plea, *nil debet*.

Amendment accordingly.

MEMORANDUM.

IN this Vacation (July 14) *Arnold Wallinger*, of the Middle Temple, Esq., was called to the degree of the coif, and gave rings with the motto "*Quid quandoque deceat*."

IN THE EXCHEQUER CHAMBER.

*(In Error from the Court of Exchequer.)*DOE *d.* WILLIAM BURTON *v.* JOHN WHITE and Others.

June 22.

IN this case a writ of error was brought upon the judgment of the Court below (a), which was argued this day (b).

Hodgson, for the plaintiff in error, pursued a similar line of argument, and relied upon the same authorities, as to the first point argued below: the second point he abandoned.

Phipson, who appeared to argue for the defendant in error, was not called upon.

PATTESON, J.—We all agree that the judgment of the Court below ought to be affirmed, and for the same reason, namely, that the words “estates and properties” do not occur in the operative part of the devise, but only in the subsequent part of it. It is argued, that those words are to have effect as shewing that the previous words intended something more. But there is no case where such effect has been given to the word “estate” in the subsequent part of a will. In the cases cited, it was attempted to cut down the effect of that word in the former part of the will, and then to argue that, as the testator did not intend the word “estate” to operate in the former part of the devise as passing the fee, it ought not so to operate in the latter; but the Courts decided otherwise. Here it is intended to enlarge the operation of the previous words, which only give a life estate, and for that there is no authority.

Held, in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that though the word “estate,” in the operative part of a will, passes not only the corpus of the property, but all the interest of the testator in it, unless controlled by the context, yet, where the word is not used in the operative clause of the devise itself, but is introduced into another part of the will referring to it, such word cannot be construed as having the effect of extending the meaning of the operative clause, whether prior or subsequent.

Judgment affirmed.

(a) 1 Exch. 526.

(b) Before *Patteson, J., Coleridge,**J., Coltman, J., Maule, J., Wightman, J., Cresswell, J., and Erle, J.*

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June 6.

WILLIAMS v. JAMES.

Assumpsit by indorsee against acceptor of a bill of exchange for 100*l*.

Plea, that after the said bill of exchange had become due and payable, W. (one of the drawers) delivered to the plaintiff, at his request, certain bills of exchange for the payment of certain sums of money therein mentioned, and amounting in the whole to more than the said sum of 100*l*., and to a large and sufficient sum of money, to wit, 380*l*., for and on account of, amongst other things, the sum specified in the said bill of exchange in the declaration mentioned, and all damages, &c.; which said bills of exchange the plaintiff took and received from W. for and on account of, amongst other things, the said sum of money in the declaration mentioned, and all damages, &c.; and that the said bills of exchange were paid and satisfied before the commencement of this suit, to wit, when they became due. Replication, that they were not paid and satisfied modo et formâ. Verdict for the defendant on this issue:—*Held*, on error in the Exchequer Chamber, (affirming the judgment of the Court of Exchequer), that the plea was bad in substance, and that the plaintiff was entitled to judgment non obstante veredicto.

ASSUMPSIT by the defendant in error (the plaintiff below), as indorsee, against the plaintiff in error (the defendant below), as acceptor, of a bill of exchange for 100*l* drawn by Philip Watkins and another person.

Plea, that, after the said bill of exchange had become due and payable, the said Philip Watkins delivered to the plaintiff, at his request, divers bills of exchange for the payment of certain sums of money therein respectively mentioned, and amounting in the whole to more than the said sum of 100*l*., and to a large and sufficient sum of money, to wit, the sum of 380*l*., for and on account of, amongst other things, the said sum of money specified in the said bill of exchange in the declaration mentioned, and all damages, &c.; which said bills of exchange the plaintiff then took and received from the said Philip Watkins for and on account of, amongst other things, the said sum of money in the declaration mentioned, and the damages sustained by the plaintiff in respect thereof; and that the said several bills of exchange were respectively paid and satisfied before the commencement of this suit, to wit, when they respectively became due and payable.

Replication, that the said bills of exchange were not paid and satisfied modo et formâ, on which issue was joined; and at the trial the defendant below obtained a verdict.

The plaintiff below subsequently obtained a rule to shew cause why judgment should not be entered for him, notwithstanding the verdict, for the insufficiency of the plea; which rule was made absolute in Hilary Vacation, 1845 (a),

and judgment was accordingly entered up in the Court of Exchequer for the plaintiff below. Upon this judgment the defendant below brought a writ of error into this Court, which was argued in Michaelmas Vacation, 1846 (Dec. 27(a)), by

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Martin (with whom was *Benson*), for the plaintiff in error, and by *Chilton* (with whom was *Davison*), for the defendant in error.—The arguments were substantially the same as those advanced in the Court of Exchequer. Besides the authorities there cited, *Chamberlayn v. Delarive*(b); Story on Bills, p. 2, pl. 2 and 3; and Kent's Commentaries, p. 75, pl. 60, were referred to.

Cur. adv. vult.

The judgment of the Court was now delivered by

WILDE, C. J.—After stating the pleadings, his Lordship said:—It was contended, on the argument before us, that the plea was substantially a plea of payment, or was a good plea, as shewing that the debt and damages were satisfied. We think this is not so. The bills delivered by Philip Watkins to the plaintiff do not appear to have been indorsed to the plaintiff, nor to have been paid; nor does it in any way appear by the plea, that the plaintiff derived any benefit under them. For anything that appears by the plea, they might have been paid and satisfied before they were delivered to the plaintiff. We therefore agree with the Court below, that the plea is bad in substance, and the judgment consequently will be affirmed.

Judgment affirmed.

(a) Before Wilde, C. J., Coleridge, J., Coltman, J., Maule, J., Wightman, J., and Erle, J.
(b) 2 Wils. 353.

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Certain waste lands in the manor of Shipley, to the soil of which, and everything constituting the soil, the lord of the manor was entitled, were, by an Inclosure Act, 55 Geo. 3, c. xxviii, (which recited the lord's title), taken away from the lord and allotted to commoners, except as saved by the 32nd clause. That clause reserved to the lord all mines and minerals, of what nature or kind soever, lying and being within or under the said commons and waste grounds, in as full, ample, and beneficial a manner, to all intents and purposes, as he could or might have held and enjoyed the same in case the said act had not been made; and enacted, that he should and might at all times thereafter have, hold, win, work, and enjoy exclusively all mines and minerals, of what nature or kind soever, within and under the said commons and waste grounds, with full liberty of digging, sinking, searching for, winning, and working the said mines and minerals, and carrying away the lead ore, lead, coals, iron-stone and fossils, to be gotten thereout: provided that the lord, in the searching for and working the said mines and minerals, should keep the first layer or stratum of earth separate and apart by itself, without mixing the same with the lower strata. The 33rd section provided for reimbursement to the owners of allotments, for injury done by searching for or working the mines and minerals:—*Held*, on error in the Exchequer Chamber, (affirming the judgment of the Court of Exchequer), that the reservation clause must be construed with reference to the title of the lord to the whole of the soil; and, inasmuch as the object of the act was to give to the commoners the surface for cultivation, and leave in the lord what it did not take away for that purpose, the word "minerals" must be understood, not in its general sense, signifying substances containing metals, but in its proper sense, as including all fossil bodies or matters dug out of mines, that is, quarries or places where anything is dug; and this notwithstanding the provision in the latter part of the clause, authorising the carrying away the "lead ore, lead, coal, iron-stone, and fossils," as fossils may apply to stones dug in quarries: therefore, that the clause reserved to the lord the right to the stratum of stone in the inclosed lands.

WAINMAN v. The EARL of ROSSE.

IN pursuance of the power reserved to the parties by the special case stated in this cause^(a), it was, after the judgment of the Court of Exchequer for the plaintiff below thereon, taken down to trial and turned into a special verdict, upon which a writ of error was brought into this Court. The case was argued in Hilary Vacation 1847, (February 7), by

Cowling (with whom was *Addison*), for the plaintiff in error (the defendant below); and by *Knowles* (with whom was *Hugh Hill*), for the defendant in error (the plaintiff below). The Court^(b) took time to consider, and their judgment was now pronounced by

WILDE, C. J.—This Court has fully considered the case of *Wainman v. The Earl of Rosse*, which is certainly one attended with considerable difficulty; but the result of the consideration of the Court is, that the judgment below must be affirmed.

Judgment affirmed.

(a) See *Earl of Rosse v. Wainman*, 14 M. & W. 859—873, where the special case is fully stated.

(b) Lord Denman, C. J., Wilde,

C. J., Patteson, J., Coleridge, J., Maule, J., Cresswell, J., and Williams, J.

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The EARL of LINDSEY v. CAPPER and Others.

June 22.

THE plaintiff having brought a writ of error on the judgment of the Court of Exchequer in this case (a), it was argued (b) (June 21) by *Humphry* for the plaintiff in error, and by Sir *F. Kelly* for the defendants in error. The arguments, which turned entirely upon the construction of the deed, are omitted.

The judgment of the Court was now delivered by

PATTESON, J.—The deed in this case provides for three possible events—first, the passing of the bill of The *Direct Northern Railway Company* within six months; secondly, the passing of the bill of The *Great Northern Railway Company* within eighteen months; thirdly, the amalgamation of the Companies, and the passing of a bill of the amalgamated Companies, without specifying any limit as to time. In the first event, a large sum of money is to be paid by the defendants, and many covenants are introduced as to stations, bridges, and various other matters.

In the second event, a large sum of money is to be paid

the date of the deed, the Company should pay the plaintiff certain large sums of money, in certain specified cases, for the injury done to and for the purchase of his land; that if the *Great Northern's* bill should pass within eighteen months from the same date, The *Direct Northern* was to pay the plaintiff, within three months after that event, certain sums of money, in certain specified cases, for compensation, &c.: *provided* that, if no act authorising The *Direct Northern* to make their line should be passed within six months from the date of the indenture, either party might put an end to the agreement by giving notice in writing; and that, after the giving of such notice, the agreement, and everything contained in it, should be absolutely null and void, except the proviso and a covenant as to certain costs to be paid to the plaintiff; and *lastly*, that if the Companies should be amalgamated, then, three months after such event, the amalgamated Companies should pay certain sums of money, in certain events: one of these being, the sum of 6000*l.* if the line followed the course of the *Direct* line without a branch to Stamford; and that in such case all the covenants applicable were to be performed by the amalgamated Companies. The declaration, after alleging that the Companies were amalgamated, that the line took the course of the *Direct Northern* without a branch to Stamford, and that the period of three months had elapsed, concluded with laying as a breach the non-payment of the 6000*l.* The defendants pleaded, that no Act of Parliament authorising The *Direct Northern* to make their intended line was passed within six calendar months; and that the defendants gave the plaintiff notice that they were desirous to put an end to the agreement; that no part of the line had passed through plaintiff's estate, and that it had not been injured under the act:—*Held*, on error in the Exchequer Chamber (reversing the judgment of the Court of Exchequer), that the plea was bad in substance, and afforded no answer to the action.

To a declaration on an indenture made between the plaintiff and the defendants, provisional directors of a projected Railway Company, called The *Direct Northern*, after reciting that plaintiff was owner of certain lands through which that railway and another, called The *Great Northern*, were intended to pass, and that the plaintiff would support the former and oppose the latter line, it was covenanted, that, if The *Direct Northern's* bill should pass before six months from

- (a) 1 Exch. 579, where the material parts of the deed are set out.
 (b) Before *Patteson, J., Coleridge, J., Colman, J., Maule, J., Wightman, J., Crosswell, J., and Erle, J.*

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by the defendants, and the plaintiff is to hand over to them all sums which he may receive by way of compensation from The Great Northern Railway Company; but none of the covenants as to stations, &c. can apply.

A proviso, however, is introduced, giving power to either party, if no act of Parliament authorising The *Direct* Northern Company to form *the* (by which we understand their) intended railway is passed within six months, to determine and put an end to the deed, except as regards the payment, by the defendants to the plaintiff, of all costs which he may have incurred. Neither of these events has happened.

The clause which applies to the third contemplated event follows immediately upon this proviso, and directs in substance, that, within three months after the passing of the bill of the amalgamated Companies, the defendants shall pay to the plaintiff certain sums of money (more or less, as the case may be); and that all covenants and agreements of the defendants, so far as the same shall be applicable, shall be observed by the amalgamated Companies. This event has happened, and the action is brought for the money covenanted to be paid three months after its happening.

The plea states, that the first-contemplated event has not happened, and that the deed has been determined and put an end to by the defendants under the terms of the proviso. Doubtless, if that proviso extends to the whole deed, and is to be taken simply as it stands by itself, the plea is an answer to the action.

But the question is, whether the amalgamation clause, following immediately after the proviso, is not to be taken as a part of and a qualification of that proviso. We are of opinion, that, by the true construction of the deed, it is to be so taken; that the amalgamation clause embodies the proviso; that they are to be read together; and that, being so read, the true effect and meaning is, that, if no bill to which the defendants are parties shall be passed within

six months, notice may be given by either the plaintiff or the defendants, to determine and put an end to the deed; but that, if any such bill do pass within six months (as in truth it has), the covenants in the amalgamation clause are to stand good and be observed.

If this be the true construction of the deed, it is plain that the plea, which negatives only the first-contemplated event, and not the third, cannot be any answer to this action, which is founded on the happening of that third event.

We are therefore of opinion, that the plaintiff is entitled to recover the 6000*l.* claimed; and that the judgment of the Court below must be reversed, and judgment entered for the plaintiff.

Judgment reversed.

JONES *v.* CHAPMAN and Others (*a*).

TRESPASS.—The first count of the declaration stated, that the defendants, to wit, on &c., with force and arms broke and entered a certain dwelling-house of the plaintiff, in the county of Denbigh, and there forced and broke open and damaged the outer door thereof, &c. There was a second count for another similar trespass on a different day. The defendants pleaded, first, not guilty; secondly, to the first count, that the said dwelling-house in that count mentioned was not, at the said time when &c., the dwelling-house of the plaintiff modo et formâ. The third plea, to the second count, was a similar traverse. Upon these pleas the plaintiff joined issue. There were also pleas to both counts, that the dwelling-house in the declaration

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Under the plea to a declaration in trespass *qr. cl. fr.*, that the close in the declaration mentioned was not, at the time when &c., the close of the plaintiff, the defendant may shew a lawful right to the possession of the close, either in himself or in some other person under whose authority he claims to have acted. So

held on error in the Exchequer Chamber, per Wilde, C. J., Coltman, J., Maule, J., Erie, J., and Williams, J.: dissentientibus Coleridge, J., and Wightman, J.

(*a*) This case is inserted here on account of its importance.

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mentioned was the dwelling-house and freehold of one Harriett Myddelton; to which there were replications of a demise by her to the plaintiff from year to year, and rejoinders thereto of a determination of the tenancy by notice to quit, before the time of the committing of the alleged trespasses: and issues were taken upon these rejoinders.

At the trial of the cause, before *Parke*, B., at the Summer Assizes for the county of Denbigh, in 1845, the plaintiff launched his case by proving that he had been in actual possession of, and had resided in, the house in question for about ten years before and up to the time of the alleged trespasses. The defendants then proved that the house was the freehold of Harriett Myddelton; that the plaintiff had occupied it as her tenant from year to year; that the tenancy had been properly determined before the time of the trespasses; and that the defendants had entered as her servants and by her authority and command. Upon this evidence the learned judge was of opinion that the defendants were entitled to a verdict, not only upon the issues raised on the pleas of *liberum tenementum*, but also upon those raised by the second and third pleas; and he directed the jury, that, upon those issues, the proper question for their consideration was, whether, at the times of the committing of the alleged trespasses, the plaintiff was *lawfully* in possession of the said dwelling-houses, as against Miss Myddelton; and that, if the defendants had by their evidence satisfied them, that, at the time of the trespasses, the said Harriett Myddelton was lawfully entitled to the possession, and that the defendants, as her servants, and by her authority and command, then committed the trespasses, in such case the second and third issues ought to be found for the defendants. To this ruling the plaintiff's counsel tendered a bill of exceptions. The defendants had a verdict upon those issues, upon which judgment was signed in the Court below; and the plaintiff thereupon brought a writ of error. The grounds of error relied on by

the plaintiff (after setting out the above direction, and alleging the same to be a misdirection in point of law), stated that the learned judge ought to have directed the jury, that, upon the evidence so given as aforesaid, the said issues ought to be found for the plaintiff, if the jury were satisfied thereby that the plaintiff, at the several times when &c., was in the *actual possession* of the said dwelling-house in which &c.

The case was argued (a) on the 1st and 2nd of December, 1847, by

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Welsby, for the plaintiff in error.—This bill of exceptions raises the question with respect to which there has existed a difference of opinion between the Courts of Queen's Bench and Exchequer—the Court of Queen's Bench being of opinion that, in an action of trespass *quare clausum fregit*, upon the issue raised by the plea that the close is not the plaintiff's close, the plaintiff is entitled to succeed, if he proves actual possession only; and that the defendant cannot, under that plea, dispute the plaintiff's title by setting up title in himself or in a third person, and justify the alleged trespass by shewing that it was done by such third person's authority and command. On the other hand, the Court of Exchequer is of opinion that the question of title is fully open to the defendant under this plea. The first case which gave rise to the expression of a difference of opinion is that of *Purnell v. Young* (b), where *Parke*, B., in a considered judgment of the Court of Exchequer, says, "If there had been nothing but the general issue and licence pleaded, and the case had occurred before the New Rules, the judge might have so certified; unless it had appeared on the evidence on the general issue *on the trial*, that the title

(a) Before *Wilde*, C. J., *Cole- liams*, J.
ridge, J., *Coltman*, J., *Maule*, J., (b) 3 M. & W. 288.
Wightman, J., *Erle*, J., and *Wil-*

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had come in question, which might have been the case on that plea (independently of any statutory provision); because it was a denial that the defendant had trespassed on the *plaintiff's* close, and put in issue the fact that *it was his close*, as well as the fact that the defendant had entered upon it. Of that title, possession would be *primâ facie* evidence against all, and it would *constitute a good title against a wrong doer*, and none against the person lawfully entitled to the possession, who, though the plaintiff had the actual possession, might have shewn that he (the defendant) was lawfully entitled to it." His Lordship shortly afterwards proceeds:—"But the plea denying *the close to be the plaintiff's*, since the New Rules, is a denial of the *plaintiff's title to the close*, to the same extent that he would have been obliged to prove it before under the general issue; that is, it is a denial of possession, if the defendant was a *wrong doer*; if otherwise, of the right to the possession: but, in either supposition, it is necessarily a denial of *title*; for, even in the former case, possession is *title* against a wrong doer; and therefore the plea raises a question of title in the action, and prevents the judge from certifying." Next followed the case of *Whittington v. Boxall*(a), which is a direct decision of the Court of Queen's Bench upon this point. That was an action of trespass *quare clausum fregit*, to which the defendant pleaded, that the close was not the plaintiff's property; and it was held that, under this plea, the defendant could not give evidence of title in himself, and that the plaintiff established his case by proving possession merely. On that occasion the present question was fully considered. Lord Denman, C. J., says, "The counsel for the defendant, upon the argument of the case, relied very much upon an expression which fell from Mr. Baron Parke in pronouncing the judgment of the Court of Exchequer in the case of *Purnell v. Young*, and which certainly is at variance with

(a) 5 Q. B. 139.

our view of the case." And again, "This dictum in *Parnell v. Young* is that from which we dissent, concurring fully with the decision of that case." In the case of *Harrison v. Dixon* (a), which followed very shortly after this decision of the Court of Queen's Bench, *Parke*, B., says, "This Court and the Court of Queen's Bench have certainly come to a different decision on the same point; the Court of Queen's Bench having held that there ought to be a special plea, in order to dispute the plaintiff's title as distinguished from his mere possession: we have thought differently." It appears, therefore, from these cases, that the present question remains to be settled by this Court.

By the rule of Hilary Term, 4 Will. 4, it is ordered that, "in actions of trespass *quare clausum fregit*, the plea of 'Not guilty' shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession, of that place, which, if intended to be denied, must be *traversed specially*." It is submitted that the view which the Court of Queen's Bench have taken of this question is the correct one. It may be conceded that, before the New Rules, the defendant was at liberty, under the general issue, to shew that, as against him, the plaintiff had no right to the possession, because some person other than the plaintiff had the right. The New Rules, however, were framed chiefly with a view to remove the great inconvenience which constantly used to arise at trials from the production of evidence which came unexpectedly upon the other side; and much inconvenience must still arise, if the allegation in the declaration be held to be capable of two meanings, viz. of *possession* and of *title*. *Possession* has ever been held sufficient to maintain an action of trespass against a wrong doer; and the plaintiff's case is *prima facie* established by such proof. The rule of Court orders, that the plaintiff's

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(a) 12 M. & W. 142.

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possession, or right to possession, must be traversed *special*ly, if intended to be denied. [*Maule, J.*—Does not the word “special” mean in contradistinction to traversed *generally*, as by the general issue?] If the title could be disputed under the traverse in question, the word “special” would have no effect. These rules were drawn by learned persons, and it is to be presumed that the words used were introduced after due consideration, and with a knowledge of the proper meaning and effect of each. In *Broune v. Dawson* (a), Lord *Denman*, C. J., said, “We agree that the question of title is not to be raised on a plea of possession. We agree also, that this action is possessory, and that possession is sufficient for the plaintiff in trespass against a wrong doer.” In *Heath v. Milward* (b), *Tindal*, C. J., says, “It is objected that, under the rule of Hilary Term, 4 Will. 4, the defendant should not be driven to allege new matter, where he takes a traverse on the plaintiff’s claim. But I see no reason why, if the fact be so, he should not allege that the close is not in the plaintiff’s possession, or is not the plaintiff’s property. Here, however, he has used the word ‘close’ in the same sense in which it is used in the declaration.” *Fleming v. Cooper* (c) and *Carnaby v. Welby* (d) are to the same effect. The plea should, therefore, have been a special one, embodying something beyond a mere traverse of the allegation in the declaration, which imports no more than such possession as is required *primâ facie* to maintain the action. If the evidence here offered be admitted under that traverse, the plaintiff, after proving a *primâ facie* case, may have to answer evidence of a totally new, and of an affirmative, description. [He also referred to *Newton v. Harland* (e).]

Peacock, contra.—The present question, no doubt, de-

(a) 12 A. & E. 624.

(b) 2 Bing. N. C. 98.

(c) 5 A. & E. 221.

(d) 8 A. & E. 672.

(e) 1 Man. & Gr. 644.

pends upon the construction to be put upon the language of the New Rule, which limits the operation of the general issue in actions of trespass *quare clausum fregit*, such construction being subject to the rules and principles of pleading. Before the New Rules, in these actions, all matters in confession and avoidance were to be pleaded specially; but under the plea of "Not guilty," the defendant could set up title in another person. Under that issue two questions were raised, first, whether the close was the plaintiff's; and if so, secondly, whether the defendant broke and entered it. In *Argent v. Durrant*(a), the Court of King's Bench held it to be clear that the defendant could give evidence that the soil and freehold were another's, under the general issue. Lord *Kenyon*, C. J., there cites a case in 1 Leon. 301, in support of that position; and he adds, "Conformably to this doctrine, I have always understood that it has been the practice to permit the defendant to give *liberum tenementum* in evidence under the general issue;" and upon this point *Lawrence*, J., cites *Gilb. Evid.* 258, *Bartholomew v. Ireland*(b), *Dr. Leyfield's case*(c), and a case before *Buller*, J., at *Nisi Prius*; and *Grose*, J., lays the rule down broadly, "that, in all cases, title might be given in evidence under the general issue;" and he adds, "I have always considered that to be the practice." It is therefore clear, from this case, and the authorities there cited, that the general issue was the proper plea under which the defendant could set up title in answer to the plaintiff's case. Trespass was considered to be a possessory action, and it has always been held sufficient for the plaintiff, in the first instance, to shew possession. Thus, it has been said, "Trespass is a possessory action, founded merely on the possession, and it is not at all necessary that the right should come in question:" *Graham*

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(a) 8 T. R. 403.

(b) Andr. 108; Cro. Eliz. 76.

(c) 10 Co. 90.

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v. *Peat* (a). In the preceding case, Lord *Kenyon* said, "Any possession is a legal possession against a wrong doer." As against a wrong doer, therefore, possession was and is *title*. Before the case of *Chambers v. Donaldson* (b), where the defendant pleaded soil and freehold in another, by whose command he justified the trespass, it was doubted whether such command could be traversed by the plaintiff, but the Court of King's Bench in that case held that it could; and *Grose, J.*, there said, "It has always puzzled me to discover any reason why the command might not be traversed as well as the soil and freehold of another, in a plea of this description, for both constitute one defence; and also, why it should not be traversed as well upon a special plea as denied under the general issue. There is no other case where the same defence may be made on the general issue and on special plea, that the same answer cannot be given to both." *Liberum tenementum* is, in truth, an anomalous plea (c), and used to be pleaded chiefly for the purpose of obliging the plaintiff to new assign.

It being perfectly clear from the decisions, that, before the New Rules, the present defence was admissible in evidence under the plea of "Not guilty;" then comes the question as to the effect of those Rules. The New Rules have not altered the meaning of the allegations in the declaration in trespass. What, then, is the meaning of the words, "the close of the plaintiff"? Before the New Rules, this allegation imported either the actual possession or the lawful possession, the first being sufficient to maintain the action against a person having no title. Now, the plaintiff must have actual possession in order to maintain trespass. That is therefore involved in the allegation that it is the plaintiff's close. So also, a party cannot treat the rightful owner as a trespasser. Which, therefore, of these two

(a) 1 East, 246.

(b) 11 East, 65.

(c) See *Harvey v. Brydges*, 14 M. & W. 439.

different meanings did the framers of the New Rules intend should be traversed? The answer is, the allegation comprehends the actual possession and the right of possession, and the traverse puts both in issue. The language of the Rules is certainly not altogether strictly technical. But the plea is to be a *traverse*, concluding to the country. There is in reality no difference between the case of goods and realty. In one case, the traverse denies the property in the goods, in the other, of the land.—He also referred to *Ashby v. Minnett*(a), and *Butcher v. Butcher*(b).

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Welsby, in reply, contended that, according to the defendant's argument, the plea of *liberum tenementum* was bad; but he admitted that, before the New Rules, the defence which might be made the subject-matter of a plea of *liberum tenementum* had been given in evidence under the general issue. He cited and referred to *Dove v. Smith*(c), *Reeves' History of the English Law*, pp. 340-1-2-3, and the cases referred to in the notes; *Bro. Abr.*, "General Issue," *Plac.* 81; *Clift's Entr.* p. 713.

Cur. adv. vult.

The Court being divided in opinion, the learned judges now proceeded to give their judgments *seriatim*.

WILLIAMS, J.—The question in this case arose on a bill of exceptions, tendered at the trial before *Parke*, B. The action is in trespass for breaking and entering the plaintiff's dwelling-house; and the defendants had pleaded (amongst other pleas) that the dwelling-house mentioned in the declaration was not, at the said time when &c., the dwelling-house of the plaintiff, *modo et formâ*; on which issue had been joined. The learned baron told the jury, in effect, that they ought to find this issue for the defend-

(a) 8 A. & E. 121. (b) 7 B. & C. 399. (c) 6 Mod. 153, (2).

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ants, if they (the jury) were satisfied, by the evidence of the defendants, that, at the said time when &c., one Harriett Myddelton was entitled to the possession of the dwelling-house, and the defendants had committed the alleged trespasses under her authority.

To this direction the plaintiff excepted, insisting that upon this issue, the judge should have directed the jury to find for the plaintiff, if they were satisfied by the evidence that at the time when &c. he was in the actual possession of the dwelling-house.

The general question is thus raised for our decision, as a Court of Error, whether, under a traverse of the allegation in a declaration in trespass quare clausum fregit, that the close was the close of the plaintiff, the defendant is or is not at liberty to shew title in himself or some other person, under whose authority he claims to have acted. And I am of opinion that he is.

I have not formed this opinion without hesitation, because it is in direct opposition to the judgment of the Court of Queen's Bench, in *Whittington v. Boxall*(a). But on consideration of that judgment, and of the authorities and reasoning on which it is founded, it appears to me to have been wrongly given.

The question turns on the construction of the New Rules of Pleading, H. T., 4 Will. 4. Before those Rules, it had long been settled law, that, under the general issue of "Not guilty," in trespass quare clausum fregit, the defendant might give evidence of title in himself, or in another by whose command he entered. The case of *Argent v. Durrant*(b) shews conclusively the establishment of this doctrine; and also discloses the principle on which it was founded, viz. that the evidence falsified the declaration of the plaintiff, inasmuch as it proved that the defendant did not break the plaintiff's close, as the declaration set forth

(a) 5 Q. B. 139.

(b) 8 T. R. 405.

Thus it appears, that, at the time the New Rules were made, the general issue, in trespass quare clausum fregit, by reason of its traversing the allegation in the declaration, that the close in which &c. was the close of the plaintiff, operated as a denial, not only of his possession, but also of his right of possession, as against a defendant lawfully entitled thereto.

But by the Rule of H. T., 4 Will. 4, *in trespass*, it is ordered, that in "actions of trespass quare clausum fregit, the plea of 'Not guilty' shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, *but not as a denial of the plaintiff's possession or right of possession* of that place, which, if intended to be denied, must be traversed specially."

The alteration, then, which this rule introduces, appears to be this—that the defendant, if he intends to deny the plaintiff's possession or right of possession, must, instead of denying it as heretofore by the general issue, deny it by traversing it specially.

It must be confessed, that the language employed in this Rule is not very happily chosen; for the expression, "special traverse," usually bears a particular technical sense (*viz.* that of a traverse consisting of an inducement and an *absque hoc*), in which it is scarcely possible it can have been intended to be here used.

What is meant, as I understand, by the Rule in this respect is, merely, that in order to enable the defendant to dispute, if he is a wrong doer, the possession, or if he claims title, the right of possession, the allegation in the declaration, that the close in which &c. is the close of the plaintiff, must be denied *specially* by a particular traverse, in contradistinction to being denied *generally*, as theretofore, by the plea of "Not guilty."

It is true that, by the terms of the Rule, taken literally, it is not this allegation, but the plaintiff's possession or right of possession, which is to be traversed. But it is a principle of pleading, that a defendant cannot *traverse* any

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matter which is not alleged or necessarily implied in the declaration; and possession, or right of possession, is only alleged or necessarily implied, in a declaration in trespass *quare clausum fregit*, as being asserted in the allegation that the close in which &c. is the close of the plaintiff.

If this be so, then the defendants in the present case, inasmuch as by the plea in question they have denied the plaintiff's allegation, that the dwelling-house in which &c. was his dwelling-house, have specially traversed the plaintiff's right of possession thereof, within the meaning of the New Rules, and have put themselves into the same position as that in which they would have been before the New Rules, if they had traversed it generally by pleading "Not guilty;" and they are consequently at liberty to shew title in themselves or in another under whose authority they acted.

For these reasons, I am of opinion that the judge's direction at the trial was correct; and that our judgment on this writ of error ought to be for the defendants.

ERLE, J.—I am of opinion that the direction excepted to was right, and that the defendants were entitled to the verdict upon the issues joined upon the second and third pleas, upon proof that they or those under whom they claimed were entitled to the possession at the time of the alleged trespass.

It is conceded that, under the plea of "Not guilty," before the New Rules, upon this proof the defendant was entitled to the verdict.

It is clear that the plea of "Not guilty," then, comprised two traverses: first, that the defendant did not do the act complained of, assuming it to be a trespass; and secondly, that the plaintiff had not such a possession as entitled him to maintain trespass against the defendant, assuming that the act of the defendant might have been otherwise a trespass.

Since the New Rules, the first of these traverses is ex-

pressed by the plea of "Not guilty," and the second by any traverse specially applied to a denial of such a possession in the plaintiff as is above described; and these two traverses are equivalent to the former plea of "Not guilty." This construction appears to be the ordinary meaning of the words of the rule. It is further confirmed by the principle, that, by entry, the possession is vested in the person having right thereto: *Taunton v. Costar* (a); *Butcher v. Butcher* (b); and also by considerations of convenience, as it is not easy to define what shall be construed the actual possession of a wrong doer against the actual possession of the owner.

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WIGHTMAN, J.—This is an action of trespass for breaking and entering the dwelling-house of the plaintiff. The defendants pleaded "Not guilty," and also that the dwelling-house in the declaration mentioned was not the dwelling-house of the plaintiff, modo et formâ, as alleged. At the trial, the plaintiff proved that, at the time of the alleged trespass, he was in the actual possession of the dwelling-house, and had been so continually for ten years previously, and there rested his case.

The defendants proved, that the dwelling-house was the freehold of Harriett Myddelton, and that the possession of the plaintiff was as tenant from year to year of the said Harriett Myddelton, and that the tenancy was determined by a notice to quit before the time of the alleged trespass; and that the defendants, after the expiration of the tenancy, as the servants of Harriett Myddelton or by her authority and command, entered upon the premises, and committed the alleged trespasses.

It was contended for the plaintiff, that this proof on the part of the defendants was not admissible under the plea that the dwelling-house was not the dwelling-house of the

(a) 7 T. R. 431.

(b) 7 B. & C. 399.

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plaintiff. The learned judge, however, was of opinion that it was admissible; and the question is, whether he was right in admitting such proof under that plea.

The action of trespass *quare clausum fregit* is founded upon actual possession by the plaintiff, who will make out a *primâ facie* case, if he proves possession in himself, and entry by the defendant. He need not give any proof whatever of title or of right to the possession. Before the New Rules, a defendant, under the plea of "Not guilty," could answer the *primâ facie* case of the plaintiff by shewing title, and a right to the immediate possession, either in himself or some person under whom he claimed, and from whom he had authority to enter. Or the defendant, if he pleased, might plead his right in confession and avoidance; and the plea would not be bad as amounting to the general issue, because it admitted the *primâ facie* case of the plaintiff, founded upon possession only, which was understood to be alleged in the declaration.

The power of a defendant, a *primâ facie* trespasser, to defeat the plaintiff by shewing title in himself or some third person, at the trial, and proving authority from that person, without notice on the record, or otherwise, of such a defence, was obviously often productive of much hardship and inconvenience.

To obviate this, the New Rules were framed.

They are introduced by a statement, that, "by the mode of pleading thereafter prescribed, the several disputed facts material to the merits of the case will, before the trial, be brought to the notice of the respective parties more distinctly than heretofore."

One of the rules accordingly was, "that, in actions of trespass *quare clausum fregit*, the plea of 'Not guilty' shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the *plaintiff's* possession, or right of possession, of that place, which, if intended to be denied, must be traversed

specially." Since the New Rules, neither the possession of the plaintiff, nor the right to the possession, can be contested under the plea of "Not guilty." If the defendant denies the possession of the plaintiff, such denial must be by a traverse; the statement in the declaration, that the defendant broke and entered the close of the plaintiff, being, in effect, an allegation that the close was in the possession of the plaintiff.

But it is said in the rule, that "if the right of possession of the place is denied," it must be by a special traverse. This part of the rule I find it very difficult to apply. The plaintiff does not assert in his declaration that he *has the right* of possession; and, in fact, he may not have such right, and yet may make out a *primâ facie* case upon actual possession only against a person who, until he is in a condition to shew title, either in himself or in any one else, is *primâ facie* a trespasser. The traverse taken would be *larger* than the allegation in the declaration, which is *primâ facie* satisfied by *actual* possession only, and therefore inadmissible, according to the ordinary rules of pleading.

But if such a form of traverse were adopted, and the defendant under it were to shew title to immediate possession in a *third* person, the issue in its terms would be found for the defendant; but still the defence would be incomplete, unless he could also shew under that issue that he entered by authority of such third person. The terms of the traverse would not of themselves warrant evidence of such authority; and the New Rules do not provide, that, under such a traverse, the defendant shall not only be at liberty to shew that the plaintiff had not the right to the possession, but that a third person had, and that such third person had authorised the defendant to enter, as he might formerly under the plea of "Not guilty." It would, indeed, be so inconsistent with the professed object of the New Rules if this were allowed, that I am not satisfied

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that it could be intended. If it was, the difficulty and inconvenience which it was the object of the New Rules to remove, still remain, as far as regards the action of trespass *quare clausum fregit*.

The defendant, however, in the present case, has not thought fit to avail himself of either of the traverses proposed by the New Rules; he has merely traversed that the close "was the close of the plaintiff," as alleged in the declaration. This, according to ordinary rules, puts in issue no more than the plaintiff was bound to prove; namely, that he was in possession. Upon this point, the case of *Heath v. Milward* (a) is a direct authority; and is followed and supported by the cases of *Browne v. Dawson* (b) and *Whittington v. Borall* (c).

A different view of the case, however, has been taken by the Court of Exchequer, in the cases of *Purnell v. Young* (d) and *Harrison v. Dixon* (e). The Court in these cases considered "that the plea, denying the close to be the plaintiff's, since the New Rules, is a denial of the plaintiff's title to the close, to the same extent that he would have been obliged to prove it before under the general issue—that is, it is a denial of possession if the defendant was a wrong doer; if otherwise, of the right to the possession." I cannot satisfy myself that this is a correct view of the effect of the alteration introduced by the New Rules, as it seems to be directly contrary to their object to make the effect of the traverse depend upon the result of the cause. The effect of the old plea of "Not guilty" was altered and modified by the New Rules, in order "that the several disputed facts material to the merits of the case, might before the trial be brought to the notice of the respective parties." A traverse of the close being the close of the plaintiff, certainly does not give the plaintiff any notice

(a) 2 Bing. N. C. 98.

(b) 12 A. & E. 624.

(c) 5 Q. B. 139.

(d) 3 M. & W. 288.

(e) 12 M. & W. 142.

that the defendant, who, upon proof of possession by the plaintiff, is a *primâ facie* trespasser, means to rely upon and give evidence of title in some third person, and that he is his servant, and entered by his command. If this were so, one of the greatest difficulties which it was the object of the New Rules to remove would be thrown upon the plaintiff. How is he to know, before he goes to trial, that it may turn out that the defendant is not a wrong doer, because he acted under the authority of some third person who had title? But the New Rules do not say so. It is far more consistent with the object and spirit of the New Rules, and with their terms and the ordinary rules of pleading, that the traverse should only put in issue the possession of the close, which is all that the plaintiff need prove to make out a *primâ facie* case, whether the defendant be a mere wrong doer, or a person having title himself, or acting under some third person having title. If the defendant does not deny the plaintiff's *primâ facie* case, founded upon actual possession, but relies either upon title in himself or in some third person, under whose authority he acted, it would be much more consistent with the New Rules and their object, and not inconsistent with the ordinary rules of pleading, that he should plead in confession and avoidance, and shew the plaintiff that he relies either on title in himself, or some third person who gave him authority to enter. Great expense and uncertainty would be avoided, the great object of pleading specially—the bringing the question to a single point—would be attained, removing great hardship and inconvenience from the plaintiff, and casting no burthen or inconvenience upon the defendant.

Upon the whole, therefore, I am of opinion that the view taken of the effect of such a traverse by the Courts of Queen's Bench and Common Pleas, in *Browne v. Dawson*, *Whittington v. Boxall*, and *Heath v. Milward*, is the correct

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one; and that, since the New Rules, the defendant in this case ought not to have been allowed to prove title in Harriett Myddelton, and that he entered as her servant and by her command, under a traverse that the dwelling-house was not the dwelling-house of the plaintiff.

MAULE, J.—I am of opinion in this case, that the direction given by the learned judge at the trial was right. The plaintiff in error complains that the learned judge misdirected the jury in point of law, in stating to them that the proper question raised for their consideration by the second and third pleas was, whether, at the several times when &c. the plaintiff was lawfully in possession of the dwelling-house in which &c., or did the defendants, by their evidence, satisfy the jury, that, at the several times when &c. one Harriett Myddelton was lawfully entitled to the possession, and that, at the times when &c. the defendants, by her authority and command, committed the alleged trespasses in the first and second counts of the declaration mentioned? Now it seems to me that the learned judge was right, and that the direction which he actually gave, adverting to the point suggested by the plaintiff in error, is in effect and substance the same as that which the plaintiff in error says ought to have been given, but with this difference, that, under the circumstances of the case, it was more proper in point of form, because it was more full and explicit, and more fitted to point out to the jury what was their practical duty upon the occasion. The question is, whether, upon the plea of "Not possessed," the defendant can give in evidence a title under a third person, and that the defendant entered in the assertion of that title, by command of that third person? And I think that he can do so, for the following plain reasons. I agree with the exception of the plaintiff in error, that the question raised by the issue of "Not possessed" is,

whether the plaintiff was in *actual possession* or not; but it seems to me, that, as soon as a person is entitled to possession, and enters in the assertion of that possession, or, which is exactly the same thing, any other person enters by command of that lawful owner, so entitled to possession, the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is, which of those two is in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser. They differ in no other respects. You cannot say that it is *joint* possession; you cannot say that it is a possession as tenants in common. It cannot be denied that one is in possession, and the other is a trespasser. Then that is to be determined, as it seems to me, by the fact of the *title*, each having the same apparent actual possession:—the question as to which of the two really is in possession, is determined by the fact of the possession following the title,—that is, by the law, which makes it follow the title. There is no doubt that the original plea of “Not guilty,” before the New Rules, in trespass, was always a mere *negative* plea, and did not (as it did in some other forms of actions, more particularly in later times, such as the case of *assumpsit*), enable the defendant to give evidence of any affirmative matter in confession and avoidance, but only enabled him to shew circumstances which proved that the facts stated in the declaration, that is, the material facts, were all, or some of them, not true. Now certainly it was not intended, after the New Rules, that mere negation—evidence which was merely negative—should be admissible only when that evidence was pleaded. It is true, the New Rules limited the effect of the plea of “Not guilty;” but they provided, at the same time, that if the possession, or right of

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and so traversing; but a special traverse, as it is used by Lord *Coke* in *the case of the Queen v. Wood*, is as contrasted with a general traverse of "Not guilty," which is as alleged in the declaration, in special traverse of one particular fact, such as a traverse of possession of the thing complained of, or of one material fact, although not a matter by way of recital, is a special traverse. The proper meaning of those words, as they are here used in these New Rules, of the possession, or right of property traversed," is simply this,—that the defendant shall not be involved in the term "Not guilty," before denied the doing of the act, or the possession or right of possession, that if the possession, or right of property, must be done by a denial restraining the declaration which makes the possession, matter of proof on the part of the plaintiff, the denial you put properly in issue is denied by "Not guilty," inter alia, the term "Not guilty," enabled certain facts, to be given upon both sides. The term "Not guilty," but it

the right of possession, or the actual possession, may be brought into question; that is, the allegation that the close was the plaintiff's. Then, where there is a traverse that the close was the plaintiff's, we are remitted to the ordinary rules of pleading and evidence, by which you are enabled to give in evidence on the part of the defendant, when he denies the allegation of the plaintiff, any matter affirmative or negative of what description soever, provided the result of it be to shew that the allegation which is denied is not a true allegation. There can be no doubt, as it seems to me, that, if you can shew that the house or land which the plaintiff has shewn in evidence to have been apparently in his possession was a house or land that really was not in his possession, you have shewn what, according to the ordinary rules of evidence—if before the New Rules the same issue had been taken, which, I apprehend, might have been taken—you might have denied. A defendant was not compelled to plead "Not guilty;" he might have pleaded that the close was not the close of the plaintiff. Supposing that had been pleaded, he might at all times have shewn that it was not the plaintiff's, by shewing that it belonged to somebody else; and I have before observed, that you do shew the possession is not the plaintiff's, but some third person's, when you have shewn that such third person had a title, and asserted it before or at the time when he committed the trespass in question, by actual entry, so as to vest the possession in that third person. I therefore think that, before the New Rules, if such evidence had been offered, and therefore since the New Rules, such evidence would be admissible. I do not find any difficulty in the matter. It has been treated as if it were a sort of *reductio ad absurdum*, that, if the law should be held as the learned judge held at the trial, and as many other judges on many former occasions have held, it would follow that the New Rules have not perfectly attained that

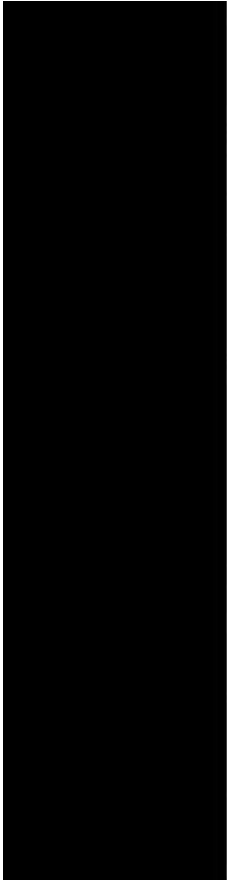
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pose and to an unlimited extent on the part of one party as to the trial by the other, they have consented; and it was impossible they should do anything short of this, namely, ordering the state in pleading the evidence to be in issue, and by which alone he should shew his case at the trial. If that view is assumed by some, and by the judgment, to have been the object to have been attained; but short of this, possibly be attained. Take any plea in abeyance, take non est factum or non prosequitur, the defendant did not make the proposed change, or any matter of mere denial, say beforehand what will be the positive and affirmative matters in issue, the evidence by the party who makes the denial shew that the fact which he denies is the mode of pleading which I have in view, pleading the evidence—shall be a matter of surprise. That possibility of surprise. That unless you were to say that no plea is good which denies any matter of fact, and any affirmative matter whatever shew that the matter affirmed is

right to possession, when accompanied by the assertion of it before and at the time of the trespass, constituting actual possession on the part of the person so having that right, and therefore negating the actual possession of the plaintiff, it appears to me that all matters, affirmative or negative, which tend to shew either of those propositions, namely, the actual possession and the right to possession of a third person, and the assertion of that right (for that is essential to this defence) at or before the time of the trespasses complained of, so as to divest the right out of the plaintiff,—that any matter of that kind, upon principle, and quite consistently with all the authorities, and without infringing upon either the letter or spirit of the New Rules, may be properly given in evidence on such a traverse as this. Upon these grounds, I think the direction on this occasion was a correct and proper direction, and therefore that the judgment ought to be affirmed.

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COLTMAN, J.—It is not necessary to advert in detail to the pleadings in this case, the greater part of which are immaterial to the present question. The declaration is in the common form, for breaking and entering the dwelling-house of the plaintiff, and so forth. The defendants (amongst other pleas, not material to the question on this bill of exceptions) pleaded, as to the breaking and entering the said dwelling-house, that it was not at the said time when &c. the dwelling-house of the plaintiff; and so concluded to the country. On the trial, the plaintiff proved that he was, and had been for several years, in possession of the house. The defendants proved that the house was the freehold of one Harriett Myddelton, and that the plaintiff had been tenant to her from year to year; that the tenancy had been duly determined; and that the defendants had entered as the servants and by the authority of Harriett Myddelton. The question which herein arises is, whether the plaintiff or the defendants are entitled to a



Bench, in *Whittington v. Boxall*(
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Boxall; but if the facts of the ca
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by *Coke*, that the same might be well enough, and so it was adjudged in *Trevillian's case*; for if he, by whose commandment he entered, hath right at the same instant that the defendant entereth, the right is in the other, by reason whereof he is not guilty as to the plaintiff; and judgment was given accordingly." From this case it appears, that the allegation in a declaration that the defendant broke and entered the plaintiff's close, imports that the plaintiff has such a title as is good against the defendant; so that, if the defendant enters without title, and the plaintiff is in possession, the allegation that it is the plaintiff's close is made out. If, on the other hand, the plaintiff is possessed, but the defendant has title, the allegation is negatived—the close is not his close. This case of *Dearsley v. Neville* was recognised in *Argent v. Durrant*(a) as having settled the law, and is fully confirmed by that case, and has never since been questioned. Now, what is the effect of the New Rule, which provides that the plea of "Not guilty" in trespass shall not operate as a denial of the plaintiff's possession or right of possession, which, if intended to be denied, must be specially traversed? It appears rather a violent deviation from the proper meaning of the terms made use of by the framers of the rule, to say that, by the words "specially traversed," it is meant that the matter directed to be traversed should be confessed and avoided. If by "traversed" is meant what it may well be understood to mean, no more direct traverse of the allegation, that the house is the house of the plaintiff, can be taken than is done by the plea in this case. If the meaning of the allegation in the declaration is simply, that the plaintiff was possessed of the dwelling-house, the plea would amount only to a denial of the possession; but if the meaning of the declaration is (as on the reasoning of those cases which I above referred to I think it ought

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(a) 8 T. R. 403.

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to be held to be), that the plaintiff has such a title as is good against the defendant, the denial must be taken to be co-extensive with the allegation, and to raise an issue as to the title.

COLERIDGE, J.—In this case, to a declaration in trespass for breaking and entering the plaintiff's dwelling-house, the defendant pleaded, secondly, that the dwelling-house, at the said time when &c., was not the dwelling-house of the plaintiff; on which issue was joined. There was a plea also to the same count, which alleged the dwelling-house to be the freehold of one Harriett Myddelton, and justified under her.

Upon the trial, the plaintiff proved an actual possession of the dwelling-house at the time of the committing the alleged trespass, and for several years before. The defendants proved that the dwelling-house was the freehold of Harriett Myddelton, and that the plaintiff's occupation was that of tenant from year to year; but that his tenancy had been duly determined by notice to quit before the time of the trespass committed, and that they, the defendants, had entered by command of Harriett Myddelton. The learned judge, in directing the jury on the issue raised by the second plea, told them that the question raised by it was, whether, at the time of the trespass committed, the plaintiff was *lawfully* in possession of the dwelling-house, and that, if the defendants had satisfied them that, at that time, Harriett Myddelton was *lawfully entitled to the possession*, and that they, as her servants and by her command had committed the alleged trespass, then the issue ought to be found for them. To this direction an exception was taken, the validity of which is now to be decided. The question which is now raised, and upon which it seems impossible to reconcile the reported decisions, turns upon the construction to be put upon the following, among the New Rules of pleading:—"In actions of trespass *quare clausum fregit*, the plea

of 'Not guilty' shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession or right of possession of that place, which, if intended to be denied, must be traversed specially." This rule must be construed on the same principles as we should apply in construing any other language. It relates to pleading, and we must, therefore, bear in mind the rules of pleading; but it is also intended arbitrarily to alter existing rules of pleading, and therefore we must not be fettered by them. I own, speaking with deference, that it seems to me that much ingenuity and learning have been somewhat misemployed on that question, from neglecting this consideration. The rule was not framed because the current of decisions had given a *wrong effect* to the plea of "Not guilty;" but because the right effect was found inconvenient, and a new and more limited effect was now to be given, although the acknowledged and strictly correct rule should thereby be broken in upon. An interpretation of the New Rule will not, therefore, necessarily be wrong, because it breaks in upon any such rule. If the words, fairly considered, lead us to that conclusion, we ought to adopt it, concluding that the framers so intended; and, bearing the mischief in mind which the rule was intended to remedy, we ought to lean to that interpretation which most advances the remedy and removes the inconvenience.

If it had been simply provided that "Not guilty" should deny only the committing of the act in the place alleged, pleaders would have had no difficulty in knowing how to deal with the remaining allegations, expressed or implied, in the declaration, according as they intended to admit or deny any of them. But the rule goes on to speak of possession and right of possession as two distinct things, either the one or other of which may be affirmed in the declaration, or denied in the plea, and if denied, whichever it may be, provides that such denial must be by special traverse. There

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can be no doubt that, considered abstractly, the two things are very different, and may admit of different specific denials; but in every case of trespass *quare clausum fregit*, the plaintiff in his declaration necessarily affirms a possession rightful as against the defendant who disturbs it, in such sense as to make his entry unlawful. It cannot be affirmed that he knows anything of the right or title which may be set up against him, and on which the defendant will rely; the language of his declaration has its ascertained meaning before the defendant's case is disclosed by his plea; and that meaning does not vary according to the greater or less strength of the defendant's title, though the proof required to support it may. If the defendant turns out to be a mere wrong doer, the plaintiff has done enough in proof of a rightful possession when he has proved the mere fact of possession; but he must go on further when title is set up against him; still, in both cases, all that he does allege—and this he must always allege—is the rightful possession against the disturber. And, as this is the case on the plaintiff's part, so on the defendant's,—whenever he admits the fact of trespass in the place alleged, and does not excuse it, his defence must be a denial of a possession rightful as against him, in any such sense as to make his entry unlawful; for, if he does not, he is an admitted trespasser. If, then, the rule had simply prevented the general issue from averring that denial of rightful possession, which, before the framing thereof, the plea of "Not guilty" had included, I should have had no difficulty in saying, that whatever plea properly traversed the possession would have let in any evidence which shewed the rightful possession not in the plaintiff, but in the defendant or any one under whom he could justify. This would have been doing merely under the substituted plea what had been allowable under the plea of "Not guilty," which had been *pro tanto* done away with; and in this view, the direction would be clearly right. The declaration has averred a possession rightful

as against the defendant. The defendant denies such a possession, and the evidence offered strictly makes out that denial. But this interpretation, it is obvious, leaves more than half the mischief which the rule provided against unremedied. The plaintiff is still left in the dark as to what case he must prepare himself to meet—what evidence he must bring to support his possession; and when it is considered that we are dealing with a rule framed with much care by very learned persons, this is a very strong presumption against the interpretation. And further, if this were all that was intended, the former part of the rule might have stood alone: nothing is gained by the latter. We must, however, treat the latter as added purposely, and as intended to convey specific instruction to the pleader, and also to further the general object of the whole body of Pleading Rules. The preamble expresses this general object to be, “that the several facts material to the merits of the cause may, before the trial, be brought to the notice of the respective parties more directly than heretofore.” This is one of the most useful purposes of all special pleading. The variety of defences which, before the New Rules, were covered even in trespass quare clausum fregit by the plea of “Not guilty,” frustrated that purpose; and this rule was clearly made to remedy the inconvenience. Without the latter half, something, no doubt, would have been effected; but still the pleader would have been at liberty so to plead as to convey no information to the plaintiff, whether the defendant meant to deny simply the bare possession, or, admitting that, to set up a superior title, and so shew that it was not, against him, a rightful possession. It seems to me, then, reasonable to suppose that the framers of the rule intended to go further, and to make their remedy complete by compelling the defendant, on the face of his pleading, to distinguish between the two defences; and that it is for this purpose that they have themselves distinguished between possession and right of possession, and have declared,

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that whichever of these two the defendant means to deny, he must do so by traversing it specially; that is, in terms so as to inform the plaintiff on which of the two defences he means by the traverse to rely. The expression "traversed specially" cannot be understood technically, as directing a "special traverse;" and I fear it must be admitted that the language is not so careful and precise as was to be desired. But the meaning that I give to the whole sentence is quite consistent with the language, and has the merit at least of effectuating the professed object of the rule, which the construction put on it by the learned judge not only fails to do, but makes the provision itself redundant and inoperative. Without the provision, the pleader would, on general principles, have done the very thing which the rule so construed directs him to do. It may be said that I restrain the full natural meaning of the plea of "not possessed," by restricting it to a denial of the bare possession; and I admit that I do so, and that the position would be difficult to maintain, if tried simply by the ordinary rules of special pleading; but the New Rules were framed purposely to modify those; in the first half of the sentence, as I have before observed, this very rule restricts the full natural meaning of "Not guilty." It cannot be denied, that if in terms it had gone on to restrict also the meaning of "not possessed," the framers might have done so consistently with their general purpose, and the course pursued in other parts of what I may call their code. There is, therefore, no objection a priori to my interpretation. The only question is, whether the words bear it.

Upon full consideration, I think they do. It is to be understood that we are dealing with language which can neither be interpreted technically nor literally. Two things are mentioned as distinct and different, which may be admitted or denied. The defendant is at liberty to deny both or either; but it is just that the plaintiff should know whether he intends to deny both, or, if not, which. The

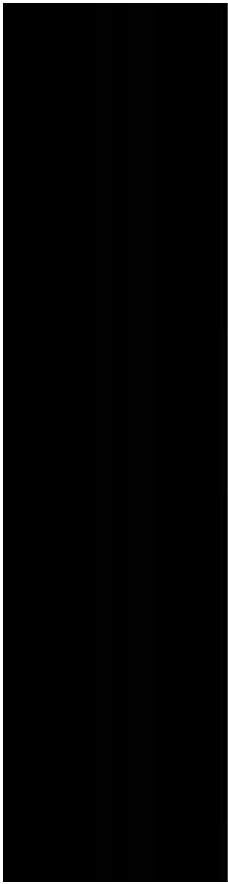
rule is, that, if he intends to deny either, he must traverse it specially. Those words, it seems to me, may well mean, that he must deny specifically in terms that which he calls on the plaintiff to prove; and I think it unreasonable to suppose the meaning to be, that he may traverse in such terms as leaves it uncertain whether he means to deny one or both, and which, if only one, of the things alleged.

I therefore think the direction of the learned judge was wrong.

PATTESON, J., said:—I did not hear the case argued; but I have had a communication with the Lord Chief Justice *Wilde* upon the matter, and he has stated to me what his opinion is; and I will now read it:—"I am of opinion that the judgment in this case ought to be affirmed; and as the grounds on which that opinion rests are clearly stated in the judgment of my learned brother *Williams*, I do not think it necessary to say more than to refer to that judgment."

Judgment affirmed.

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Debt on Simple Contract, when not Maintainable.

Where a sum of money is secured by a deed, and a balance is struck for the purpose of ascertaining how much remains due thereon, and the obligor admits the correctness of the account, and promises to pay it—Debt on simple contract, on an account stated, will not lie, but the action must be brought on the specialty. *Middleditch v. Ellis*, 623

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Abstract of Title, when sufficient.

By agreement in writing, the defendant agreed to sell, and the plaintiff to purchase, a piece of land, and to pay part of the purchase-money down, and the remainder on a future day; and it was agreed that the plaintiff should have immediate possession, and that the defendant should furnish the plaintiff with a *full and sufficient abstract* of title to the land, and, upon payment of the balance of the purchase-money, a conveyance of the fee-simple should be made; that all objections to, and requisitions in support of, the title, not delivered in writing in a month after the delivery of the abstract, should be deemed to be waived. The plaintiff paid the deposit, and took possession of the land. The defendant, in due time, delivered an abstract, containing a statement of all the deeds, &c. in his custody, power, or knowledge, but tracing the title for a period less than sixty years, and shewing it to be in a trustee. No objection was made within the month. Afterwards the trustee died intestate; and it not appearing in whom the legal estate vested, the plaintiff gave notice that he rescinded the contract, and brought an action to recover back the deposit, and, in one count of the declar-

ation, declared specially on the agreement, and assigned as a breach the non-delivery of a "full and sufficient abstract" of the defendant's title to the land, which was traversed by a plea. The second count was for money had and received:—*Held*, that, no objection having been made within the month, the issue was satisfied by the abstract delivered, it having been a full and fair statement of all the muniments which the defendant had in his possession, power, or knowledge, and a fair statement of the deduction of his title, though it did not go back sixty years.

Also, that the plaintiff could not rescind the contract and recover the deposit under the count for money had and received, inasmuch as, having taken possession of the land, the parties could not be placed in statu quo. *Blackburn v. Smith*, 783

ALLOTMENT, LETTER OF.

Construction of.

In an action by an allottee of a Railway Company for the recovery of his deposit (the project having been abandoned), it appeared that the shares had been allotted to him upon the terms of the following letter of allotment:—"The directors assume the right to carry out their intentions by the adoption of all such measures as they may deem requisite for obtaining the necessary parliamentary powers to form a company for the construction of the entire railway, or any part of it, with such branches, extensions, or alterations as they may find expedient, and to apply the amount paid for deposits in discharge of any liabilities incurred by them under the general powers vested in them for the prosecution of the undertaking. A subscribers' agreement and parliamentary contract, in such form and with such provisions as the committee may think necessary, will

be prepared and lie at the Company's offices for signature, from &c., both inclusive:—"*Held*, that, upon the true construction of this letter of allotment, the directors had authority to lay out the deposits in such necessary expenses as had been incurred by them in the prosecution of the scheme, and, all the deposits having been so expended, that the plaintiff was not entitled to recover. *Jones v. Harrison*, 53

Words "not transferable."

A., by letter, requested the committee of a Railway Company to allot him a certain number of shares in the undertaking, and thereby undertook to receive the same, or any less number, and to pay the deposit and execute the parliamentary contract and agreement when required. In answer to this application, he received a letter from the Company allotting him certain shares. This letter was headed, "*Not transferable*."—*Held*, that this term qualified the acceptance, and that the two letters did not together constitute any contract; and, therefore, in an action by the Company against A., to recover the deposit, that they were not entitled to recover. *Duke v. Andrews*, 290

ALLOTTEE.

See ALLOTMENT.

CALL.

PARTITION.

ANNUITY.

See LUNACY.

APOTHECARY.

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ARBITRATION AND AWARD.

(1). *Mistake of Arbitrator in Point of Law.*

A writ having issued in an action of

debt against an incorporated Railway Company, the defendants' attorney consented to a judge's order referring to arbitration "the claims of the plaintiff in the action." The plaintiff claimed, before the arbitrator, a sum for extra work occasioned by the defendants' breach of covenant in not giving the plaintiff possession of certain land at a stipulated time. The arbitrator entertained this claim, though objected to, and awarded the plaintiff a sum in respect of it. The Court having refused to set aside the award—*Held* (on motion to enforce it under the 1 & 2 Vict. c. 110), first, that if the matter in dispute were not within the jurisdiction of the arbitrator, the defendants should have applied to the Court to revoke the submission; but not having done so, and the plaintiff having set up this matter as "a claim in the action," and the arbitrator having so decided in respect of it, his award was binding, however erroneous.

Secondly, that the submission was valid, though the attorney had no authority, under seal, to defend or refer the cause. *Faviell v. The Eastern Counties Railway Company*, 344

(2). *Uncertainty as to Costs of making Submission a Rule of Court.*

By agreement in writing, certain disputes were referred to arbitration, "the costs of the submission, reference, award, and of making the submission a rule of court, to be in the discretion of the arbitrators." The arbitrators awarded that the costs of the submission, reference, and award, should be borne by the parties in equal proportions; and that the costs of making the submission a rule of court should be paid by such of the parties through whose default, in the performance of the award, the same should become necessary:—*Held*, that the award was not final or certain as to the costs of mak-

ing the submission a rule of court, and therefore bad. *In the Matter of Smith and Wilson*, 327

(3). *Uncertainty—Demand of Sum awarded.*

A cause and all matters in difference between the parties, were referred to two arbitrators and an umpire: the costs of the cause to abide the result. The umpire awarded that all further proceedings in the cause should thenceforth cease and be no further prosecuted, and that the plaintiff should pay to the defendant 12s. 0½d., found to be due to him. A demand was made of 21l. 16s. 2d., being the costs in the cause, but not of the 12s. 0½d. A rule having been obtained, calling on the plaintiff to shew cause why he should not pay the defendant both those sums, the Court, considering the validity of the award doubtful, refused to make the rule absolute even as to the sum demanded. *Tattersall v. Parkinson*, 342

(4). *Account stated. Costs of taking up Award.*

An award is not evidence of an account stated between the parties to the submission.

By articles of agreement between the plaintiff of the one part, and the defendants of the other part, certain differences between them were referred to arbitration, the costs of the reference and award to be in the discretion of the arbitrators. The arbitrators, after finding a sum due from the defendants to the plaintiff, awarded that the costs of the reference and award, including compensation to the arbitrators, should be borne as follows: that is to say, one moiety thereof by the plaintiff, and the other moiety by the defendants. The plaintiff took up the award, and paid the whole costs of it:—*Held*, that he could not recover a

notice to L. and H., the parties interested in certain land required for the railway, to treat for the purchase thereof. L. and H. then served the Company with a notice, stating that, as trustees under the will of F., they claimed an estate and interest in certain copyhold lands and hereditaments, situate &c., required to be purchased by the Company, and they claimed 334*l.* 17*s.* 6*d.* as the amount of compensation for the said lands and hereditaments, and desired to have the same compensation settled by arbitration, and appointed T. one of the arbitrators. Another arbitrator having been appointed by the Company, the two arbitrators nominated an umpire, who proceeded with the reference, when W. claimed compensation, alleging that he had a leasehold interest in the lands in question. The umpire awarded 1861*l.* to be paid by the Company to L. and H., as such trustees, for the purchase of the fee-simple in possession, free from all incumbrances, of and in the copyhold lands and hereditaments required to be purchased by the Company:—*Held*, that, under the statute, the award was bad, the umpire not having found the nature of the interest of L. and H. in the lands, and awarded a distinct compensation in respect of it; but the Court refused to set the award aside, leaving the Company to

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ported by reference to the conduct of the parties, *quære*. In the *Matter of an Arbitration between The North Staffordshire Railway Company and Wood*, 244

ARREST OF JUDGMENT.

See PLEADING, I. (5).

ASSESSED TAX.

Assessment when Final.

An assessment under the Assessed-Tax Acts is final and conclusive, unless appealed against in the manner prescribed by the 43 Geo. 3, c. 99, s. 24. Therefore, where a party was assessed to the duty imposed on "horse-dealers,"—*Held*, that the decision of the assessor, that the party was a horse-dealer, however erroneous, could not be questioned in an action.

Quære, whether a person who for commission sells by auction or private contract the horses of others is a "horse dealer" within the Assessed-Tax Acts.

Replevin lies in every case of an alleged wrongful taking of goods. *Allen v. Sharp*, 352

ASSETS QUANDO.

See EXECUTOR.

ATTORNEY.

See COUNTY COURT.

EVIDENCE, (6).

(1). *Uncertificated.*

The 26th section of the 6 & 7 Vict. c. 73, only disables an uncertificated attorney from suing for fees, rewards, or disbursements for any business, matter, or thing done by him as an attorney or solicitor in some suit or proceeding in one of the Courts mentioned in the act, and not for business done which had no reference to such suits or proceedings. *Richards v. Lord Suffield*, 616

VOL. II.

(2). *Authority of, to release Debtor.*

Where a party was taken in execution on a ca. sa., and the creditor's attorney, *bonâ fide*, but without his authority, entered into an arrangement with the debtor for his release, upon his paying a portion of the debt, and giving a warrant of attorney for the residue, and the sheriff, in obedience to an order from the attorney, discharged him—*Held*, in an action against the sheriff, that he was liable for the escape. *Connop v. Challis*, 484

(3). *Liability of, for Fees when employing Bailiff.*

Where a bailiff is employed by an attorney to issue execution against a defendant, the attorney, and not the client, is liable to the bailiff for his fees. *Maile v. Mann*, 608

ATTORNEY-GENERAL.

See REVENUE.

ALLOTMENT.

See ELEGIT.

BANK.

Lien on Shares and Dividends.

The deed of settlement of a banking copartnership provided "that the directors should have a lien on the shares and stock of every shareholder, for debts due from him to the Company;" and that "the directors might cancel and declare forfeited or sell the shares of such shareholder, or otherwise deal with the same as the case might require, for obtaining payment of such debts:"—*Held*, that the bank had a lien, not only on the shares, but also on the dividends of a shareholder who had overdrawn his account; and therefore that he could not recover such dividends as money had and re-

III

EXCH.

interest shown by him on the yearly balance of a tax-collector's account, in which his own and the Crown monies are blended together. Also to recover the amount of a banker's promissory note in the hands of a tax-collector, and received by him in payment of taxes. *Regina v. Adams*, 299

2. A tax-collector was accustomed to pay monies received on account of taxes to R., who paid the same into his banker's to his private account, with knowledge of the banker that the same were blended with the monies of R. The banker having become insolvent—*Held*, that an extent in chief might issue against him for the recovery of the Crown monies, the amount being a question for a jury. *Rex v. Ward*, 301, n.

BANKRUPT.

See STOPPAGE IN TRANSITU.

(1). *Promise by, before Certificate.*

Assumpsit. The declaration set forth a guarantee, whereby, in consideration that a banking copartnership would make advances to the defendant, the plaintiff undertook to guarantee the copartnership the due payment of sums advanced not exceeding 250*l.* Averment, that the copartnership made advances to the defendant, who afterwards became bankrupt, and that, at the time of his

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any securities against the defendant's estate, and apply all the dividends in consideration of the debt beyond the 250*l.*, and that the plaintiff should only be entitled to the benefit of any proof or dividend after the Company should have received the full amount owing to them, and that the Company might recover the full amount guaranteed from the plaintiff; that large advances were made by the Banking Company, and that they proved the whole sums due to them, and forced the plaintiff to pay the 250*l.* for which he was security to the bankers for the bankrupt. On demurrer to the replication,—*Held*, that the plaintiff's debt was barred by the 52nd and 121st sections of the Bankrupt Act, 6 Geo. 4, c. 16. *Earle v. Oliver*, 71

(3). *When Debt not within Order and Disposition of the Bankrupt.*

H., residing in Australia, was indebted to A. in 771*l.* 3*s.* 4*d.* On the 8th January, 1844, A., *bonâ fide*, and for a valuable consideration, assigned the debt to W., and on the 22nd January joined W. in a letter notifying to H. the assignment, and requiring him to pay the debt to W. This letter was posted on the 1st February, 1844, in the ordinary way in which letters to New South Wales are posted, and could not have reached Australia before the 10th February, on which day a fiat in bankruptcy issued against A. On the 29th January, 1844, H. remitted, by letter, 50*l.*, which was received after the fiat and delivered over to W. The assignees of A. having sued W. for the amount—*Held*, that, W. having taken every possible step to obtain possession of the debt, it could not be said to remain in the order and disposition of the bankrupt with the consent of the true owner, within the meaning of the 72nd section of the 6 Geo. 4, c. 16. *Belcher v. Bellamy*, 303

(4). *"Transaction," within 2 & 3 Vict. c. 29, what is.*

A trader took possession of goods under an agreement with the owner that he should keep possession for a twelvemonth, on payment of a certain sum, but if the money was not paid on a certain day, the owner should be at liberty to retake them. The goods continued in the possession of the trader until the stipulated time for payment, when the money not having been paid, the owner sold them, after an act of bankruptcy committed by the trader, but before the fiat issued:—*Held*, that this was a "transaction" protected by the 2 & 3 Vict. c. 29, s. 1. *Young v. Hope*, 105

(5). *Deed of Transfer under 6 Geo. 4, c. 16.*

A deed for the transfer of a trader's property is not void as against future creditors, although the execution of it be an act of bankruptcy under the 3rd section of the stat. 6 Geo. 4, c. 16. *Oswald v. Thompson*, 215

(6). *Reputed Ownership.*

A., a horsedealer and jobber, by a deed of trust, assigned all his stock in trade, &c. to certain trustees, for the benefit of his creditors, until all his then debts should be paid off, to hold on certain trusts, *inter alia*, that, so long as A. should observe the orders of the trustees, he was to be allowed to carry on and conduct the business, subject to their orders, but that they should have the power to determine his possession on his failing to observe their orders; that all monies received in the business were to be paid to the account of the trustees, and all monies paid by their cheques; and that A. was to receive a certain weekly salary. The creditors also advanced a large sum of money to carry on the business. The business was carried on by A. for some



(3). *Insufficient Notice of Dishonour.*

The holder of an overdue bill of exchange went during business hours to the counting-house of the drawer, for the purpose of giving notice of dishonour, and finding the counting-house shut, he knocked at the door, and no one answering, he came away without leaving any notice:—*Held*, that these facts did not support an allegation of due notice, but were equivalent to a dispensation of notice, and ought to have been so pleaded.

Semble, that the holder might have treated the absence of the drawer from his place of business as an excuse for delivery of notice on the proper day, and that a delivery at the first opportunity, on a subsequent day, would have supported an averment of due notice. *Allen v. Edmundson*, 719

BOND.

Not to practise as a Surgeon within certain Limits, &c.

To debt on bond, by the executors of the obligee, the defendant, after setting out on over the condition, which was, that "if the obligor should practise as a surgeon or apothecary at S., at any time, without the consent in writing of the obligee, then, if the obligor should pay the obligee 1000*l.*, the bond should be void, otherwise it should remain in force," pleaded, that he did not practise as a surgeon or apothecary at S. without the consent in writing of the obligee:—*Held* bad, on general demurrer, for not shewing the performance of the condition which rendered the bond void—*Held*, also, that the period of restraint, mentioned in the condition, was not confined to the lifetime of the obligee. *Hastings v. Whitley*, 611

BOUGHT AND SOLD NOTES.

See EVIDENCE, (2).

BREACH.

See PLEADING, (1).

BURTHEN.

See FERRY.

CALL.

"*Call*," where, need not specify Place or Time for Payment.

Under the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16), a resolution by directors to make "a call" need not specify either the time or place for payment; but the directors must appoint a time and place, which must be notified to the shareholder by a notice, allowing twenty-one days for payment. A purchaser of scrip certificates for shares in a Railway Company is not liable for calls until his name is entered on the *sealed* register of shares. Whether an original allottee would in such case be liable, *quære*. *The Newry and Enniskillen Railway Company v. Edmunds*, 118

CARRIERS' ACT.

"*Servant*" of Carrier.

Where a common carrier enters into a sub-contract with other parties with respect to goods which he has undertaken to carry, the servants employed by the latter are "servants in the employ" of the carrier, within the true meaning of the 8th section of the Carriers' Act, 11 Geo. 4 & 1 Will. 4, c. 68.

A delivery ticket, issued by the defendants, a Railway Company, in respect of goods they had undertaken to carry, contained the name of T. J., described therein as a *porter*. The ticket was signed by "C. & H., agents." The goods were stolen by T. J. whilst under the care of C. & H., with whom the defendants had entered into a sub-contract for the carriage of the goods. In an action against the defendants

for the loss of the goods, *quare*, whether the ticket estopped the defendants from denying that T. J. was their servant:—*Semle*, that it would not. *Machu v. The London and South Western Railway Company*, 415

CERTIORARI.

See COUNTY COURT.

CONSIDERATION.

See BANKRUPT.

CONVERSION.

See TROVER.

CORPORATION.

See ARBITRAMENT AND AWARD.

COSTS.

See COUNTY COURT.

CO-SURETY.

When liable for Contribution.

One of the co-sureties of a bond received from his principal a promissory note to the amount of that instrument:—*Held*, that it was a question for the jury to say *quo animo* the note was given, and whether it was given in pursuance of an arrangement that the defendant should be thereby discharged, or merely by way of collateral security, in which latter case the defendant would be liable for contribution on payment of the bond by his co-surety. *Done v. Walley*, 198

COMMITTEE-MAN OF RAILWAY COMPANY.

Liability of.

In an action against a provisional committee-man of a Railway Company, it is a question of fact for the jury, whether he has appointed the committee of management with power to pledge his credit upon a contract

COUNTY COURT.

entered into by them. *Williams v. Pigott, Bart.*, 201

COMPENSATION.

See ARBITRATION AND AWARD, (5).

CONDITION.

See BOND.

CONSTABLE.

See POOR RATE.

CONTRIBUTION.

See CO-SURETY.

COPYHOLD.

See PLEADING, II. (1).

COUNSEL.

See PRACTICE.

COUNTY COURT.

(1). *Removal of Plaintiff by Certiorari.*

A certiorari to remove a plaintiff from the county court, under the 9 & 10 Vict. c. 95, s. 90, may issue upon an *ex parte* application to a judge.

It is no objection to such writ that it is tested in the term prior to that in which it issued. *Symonds v. Dimsdale*, 533

(2). *Prohibition. Proof of Service of Summons to satisfaction of Judge of County Court.*

A summons in a plaintiff in a county court, under the 9 & 10 Vict. c. 95, having been served at a wrong place, the defendant had no knowledge of the proceedings until his goods were taken in execution. Before judgment, proof was given, to the satisfaction of the judge, that the summons had been served as required by the 80th section.

COUNTY COURT.

The judge refused to set aside the proceedings, except on terms to which the defendant declined to accede:—*Held*, that the judge had jurisdiction over the matter, and that a prohibition would not lie.

Whether a prohibition lies under any circumstance to a county court after execution levied, *quære*. *Robinson v. Lenaghan*, 333

(3). *Suggestion*.

A plaintiff having obtained a verdict for 30*s*. in an action for money paid, a rule was made absolute to enter on the roll a suggestion that the defendant resided within the jurisdiction of the Middlesex County Court, and "that the plaintiff pay the defendant his costs of suit, pursuant to the 23 Geo. 2, c. 23, and 5 & 6 Vict. c. 97:—" *Held*, that, as the defendant's right to the costs depended on the event of the trial of the suggestion, the Court had no power, by rule, to order the plaintiff to pay them. *Sanson v. Price*, 338

(4). *Affidavit for Suggestion*.

A defendant, who seeks by suggestion to deprive the plaintiff of costs, under the 9 & 10 Vict. c. 95, s. 129, need not, in his affidavit in support of the motion to enter such suggestion, negative any grounds for refusing the suggestion, which are not mentioned in these sections. A *prima facie* case on the part of the defendant is sufficient to entitle him to enter a suggestion.

The Court allowed a suggestion to be entered, although part of the cause of action arose on a bill of exchange, and the Court expressed a doubt whether such matter was within the jurisdiction of the county court. *Butler v. Corney*, 474

(5). *Privilege of Attorney*.

The County Courts Act, 9 & 10

COVENANT, DEBT ON. 845

Vict. c. 95, has not deprived attorneys of their privilege of suing in the superior courts. *Jones v. Brown*, 329

COVENANT, DEBT ON.

See PLEADING, (1).

(1). *When Action not maintainable upon*.

No action will lie on a covenant by C. to pay a sum of money to A., B., and himself C., or the survivors or survivor of them on their joint account. *Faulkner v. Lowe*, 595

(2). *Construction*.

A declaration in covenant set out an agreement, dated the 27th of April, 1840, whereby, after reciting that the defendant was indebted to the plaintiffs in 60*l*., to be repaid, with interest, at 5*l*. per cent., it was agreed, "that the said sum of 60*l*. shall remain in the hands of H., the defendant, from the date hereof, for one whole year; that, at the expiration of that period (if the interest shall be then paid, and no notice be then given to call in the same), the 60*l*. shall continue in the hands of H. for another year, and so on from year to year, until notice, in writing, shall be given by B. (the plaintiff) to call in the same; that twelve calendar months' notice, in writing, shall be given to call in the 60*l*.; and that, at the expiration of the said notice, the same shall be paid by instalments of 10*l*. every third month, until the whole amount be paid, the first payment of 10*l*. to be made at the expiration of fifteen months from the date of the said notice, so that the whole amount of 60*l*. shall be paid by the end of two years and six months from the date of the said notice." Averment, that notice in writing, dated the 29th of May, 1846, was served upon the defendant to call in the principal sum of 60*l*.; and that,

(*Platt*, B., dissentiente), that, after the expiration of the first year, the notice to pay off the principal might be given at any period of the year, and that the time for payment of the instalment was to be calculated from the date of the notice, not from the day of the year corresponding with the date of the agreement. *Brown v. Hartill*, 434

(3). *Construction.*

A declaration stated, that, by an indenture between the plaintiff and the defendants, the plaintiff sold the defendants certain letters patent, and the defendants covenanted to pay the plaintiff 840*l.* by instalments; provided, that, if at the expiration of twelve months from the date of the indenture the defendants should not approve of the patent, and of such their disapprobation, and intention to sell the patent, should give notice in writing to the plaintiff, the payment of the first instalment should be suspended; and if, having given such notice, the defendants should, within six months, sell the patent for the best price that could be obtained for the same, and, retaining to themselves 240*l.* and certain costs, pay over to the plaintiff the surplus (if any), the covenant for payment of the 840*l.* should cease; but if the defendants, having given such notice, should ne-

in certain specified cases, for compensation, &c.: *provided*, that, if no act authorising the Direct Northern to make their line should be passed within six months from the date of the indenture, either party might put an end to the agreement by giving notice in writing; and that, after the giving of such notice, the agreement, and everything contained in it, should be absolutely null and void, except the proviso and a covenant as to certain costs to be paid to the plaintiff; and *lastly*, that if the Companies should be amalgamated, that then, three months after such event, the amalgamated Companies should pay certain sums of money, in certain events: one of these being, the sum of 6000*l.* if the line followed the course of the *Direct* line without a branch to Stamford; and that in such case all the covenants applicable were to be performed by the amalgamated Companies. The declaration, after alleging that the Companies were amalgamated, that the line took the course of the Direct Northern without a branch to Stamford, and that the period of three months had elapsed, concluded with laying as a breach the non-payment of the 6000*l.* The defendants pleaded, that no act of Parliament authorising The Direct Northern to make their intended line was passed within six calendar months; and that the defendants gave the plaintiff notice that they were desirous to put an end to the agreement, and that no part of the line had passed through plaintiff's estate, or that it had been injured under the act:—*Held*, on error in the Exchequer Chamber (reversing the judgment of the Court of Exchequer), that the plea was bad in substance, and afforded no answer to the action. *The Earl of Lindsey v. Capper*, 801

DEMAND.

See MONEY HAD AND RECEIVED.

DEMURRER, SPECIAL.

See PRACTICE, (3).

DEVISE.

(1). *Estate in Fee-simple.*

A testator, by his will, dated the 26th July, 1825, devised as follows:—"I give and devise unto my wife E., to W. H. and J. C., their heirs, executors, and administrators, all my real and personal estates whatsoever, upon trust to pay the rents, interest, and produce thereof unto my said wife during her lifetime, and after her decease to pay and apply the rents, issues, and profits thereof for and towards the maintenance of my children during their lives, with benefit of survivorship; and, after their several deceases, I give and devise the share of her so dying unto her children and unto his or their heirs, as tenants in common. I give, direct, ordain, and appoint unto my said wife E., to W. H., and J. C., their heirs, executors, and administrators, power and authority to sell, dispose of, mortgage, lease, and otherwise in all manners manage my estate, both real and personal, as if I were living. I appoint my wife E., and W. H. and J. C., the executors of this my will, and also guardians of my children." The testator died in 1825, leaving his widow E. (one of the plaintiffs) and three infant daughters unmarried, the youngest of whom died in 1844; and the eldest in 1832 married, and had several children living at the date of the hereinafter-mentioned contract of sale. J. C. never acted under the will, and, in 1833, executed a deed disclaiming all interest under the will. The other party, W. H., died in 1840. In 1845, E., the testator's widow, entered into a contract to sell certain land of which the testator was seised in fee simple at the time of his death:—*Held*, in an action by E. against the vendee for

the recovery of the purchase money, that she took an estate in fee simple in the land in question, and could therefore give a good title. *Watson v. Pearson*, 581

(2). *Meaning of Term "Estate."*

Held, in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that though the word "estate," in the operative part of a will, passes not only the corpus of the property, but all the interest of the testator in it, unless controlled by the context, yet, where the word is not used in the operative clause of the devise itself, but is introduced into another part of the will referring to it, such word cannot be construed as having the effect of extending the meaning of the operative clause, whether prior or subsequent. *Doe d. Burton v. White*, 797

DIRECTOR.

See ALLOTMENT.
JOINT-STOCK COMPANY.

DISCHARGE.

See PLEADING, I. (1).

DISTRESS.

A tenant by elegit has a right to distrain without attornment. *Lloyd v. Davies*, 103

What Things distrainable at Common Law.

Commodities which cannot be restored upon a replevin in the same plight and condition as that in which they were when taken, are not distrainable for rent at common law; and therefore the flesh of animals lately slaughtered cannot be distrained. *Morley v. Pincombe*, 101

DIVIDENDS.

See BANK.

ESTOPPEL.

EJECTMENT.

See PLEADING, III. (2).

ESCAPE.

Recaption by Crown.

A party in custody under a writ of extent, at the suit of the Crown, was allowed voluntarily to escape, but was retaken and restored into the same custody, and under the same writ:—*Held*, that he was rightly in custody, and was not entitled to his discharge.

Writs of extent are returnable in vacation, under the stat. 5 & 6 Vict. c. 86, s. 8. *Regina v. Renton*, 216

ESTATE.

See DEVISE.

ESTOPPEL.

See BANKRUPT (6).
CARRIERS' ACT.
EVIDENCE.
PLEADING.

In pais.

In trover by the assignees of a bankrupt against a sheriff, for the conversion of the bankrupt's goods, seized under a fi. fa. against C. and D., it appeared, that, immediately before the seizure, the bankrupt told the officer that the goods were the property of C.; and, immediately afterwards, he contradicted that statement, and said they were the goods of D. The jury found, that the goods were in reality the bankrupt's; but also, that he represented the goods to the officer as the goods of C., so as to induce the officer, by that false representation, to seize them:—*Held*, that, under the plea of not possessed, this finding did not estop the bankrupt, and the plaintiffs as assignees, from complaining of the seizure of the goods as their own.

The rule laid down by the Court of

Queen's Bench, that, "where one, by his words or conduct, *wilfully* causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time;" and, again, "a party who *negligently* or *culpably* stands by, and allows another to contract on the faith of a fact which he can contradict, cannot afterwards dispute that fact in an action against the party whom he has himself assisted in deceiving," is to be taken with this explanation, that, by the term "*wilfully*," must be understood, if not that the party represents that to be true which he knows to be untrue, at least, that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real meaning may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and that conduct, by negligence or omission, when there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect. *Freeman v. Cooke*, 654

EVIDENCE.

(1). *Parol Evidence when admissible to explain Written Document.*

The defendant ordered goods by letter, which did not mention any time for payment. The plaintiff sent the goods and an invoice:—*Held*, that parol evidence was admissible to show that the goods were supplied on credit, the letter not being a valid contract within the Statute of Frauds. *Lockett v. Nicklin*, 93

(2). *When admissible to annex Term.*

In an action for the price of tobacco sold, evidence is admissible to shew that by the established usage of the tobacco trade all sales are by sample, although not so expressed in the bought and sold notes. *Syers v. Jonas*, 111

(3). *Date of Letter.*

The date of a letter is *prima facie* its true date. *Potez v. Glossop*, 191

(4). *Marriage Register.*

In support of a plea of coverture, an examined copy of a register of marriage between the defendant and one J. G. was given in evidence. A witness deposed, that he knew one J. G. and his handwriting; and that the handwriting of the J. G. in the register was that of the person whom he knew:—*Held*, that the evidence was admissible without the production of the original register. *Sayer v. Glossop*, 409

(5). *Bill in Chancery.*

A bill in Chancery is not evidence of the truth of the facts stated in it, as against the party in whose name it is filed, even though his privity be shewn, but is only admissible to prove that a suit was instituted, and the subject-matter of it.

Semble, that pleadings in equity as well as at common law are not to be treated as positive allegations of the truth of the facts therein, for all purposes, but only as statements of the case of the party, to be admitted or denied by the opposite side, and if denied, to be proved and ultimately submitted for judicial decision.

The facts actually decided by an issue in any suit, cannot be again litigated between the same parties, and are conclusive evidence between them; so are the material facts alleged by one party which are directly ad-

mitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, if the traverse is found against the party making it. But the statements of a party in a declaration or plea, though for the purposes of the cause he is bound by those that are material, ought not, it should seem, to be treated as confessions of the truth of the facts stated.

Boileau v. Rullin, 665

(6). *Where Secondary Evidence not permitted. Privilege of Attorney.*

In an action on a covenant by lessee against lessor, where the lease had been executed by defendant's agent, under a power of attorney, upon whom a subpoena duces tecum had been served, but not in proper time:—*Held*, that secondary evidence of the contents of the power of attorney ought not to be admitted.

An attorney cannot be compelled by the Court to disclose the contents of a client's deed in his possession, but if he do so *willingly* the evidence may be received. *Hibberd v. Knight*, 11

EXECUTOR.

See PLEADING, III. (1).

Renunciation.

A testator appointed two executors, one of whom formally renounced, the other proved the will and died, leaving effects unadministered:—*Held*, that the renunciation was absolute, the executor not having retracted it, and that it was not necessary to cite him before granting administration de bonis non to another person. *Venables v. The East India Company*, 633

EXEMPTION FROM TITHES.

See TITHES.

EXTENT IN CHIEF.

See BANKER.

FERRY.

FALSE STATEMENT.

See MONEY HAD AND RECEIVED.

FEIGNED ISSUE.

See TITHES.

FERRY.

In an action for the disturbance of a ferry, the first count of the declaration stated, that the plaintiffs were possessed of a ferry across the river Tyne, between North Shields and South Shields, for the conveyance of carriages, &c., and passengers, and that the defendant disturbed this ferry by carrying passengers. The second count stated a right to an ancient ferry. The defendants pleaded (*inter alia*) not guilty, not possessed, and also that the boat used by the defendants was of less than four tons burthen. The Company was incorporated by the 10 Geo. 4, c. xcvi, for establishing a ferry across the river Tyne, within the limits of Tynemouth and the township of South Shields and Westoe. Section 85 enacts, that, after the ferry shall be established, no other ferry shall be set up and used by any person across the river Tyne, within the said limits; and if any person (except the Company, or persons acting under their authority) shall use any boat or other vessel of the burthen of four tons or upwards, in ferrying for hire across the river within the limits aforesaid, every person so offending shall forfeit 5*l*. At the time the above statute passed, there was an ancient ferry across the river within the same limits, which the Company, under the powers of their act, purchased of the owners:—*Held*, first, that the word "burthen" in the 85th section, did not mean "register admeasurement," but capacity of carrying. Secondly, that the latter part of the 85th section did not limit the general right of ferry, but only added a cumulative re-

medy by way of penalty. Thirdly, that there was no variance by reason of the first count describing the ferry generally from North Shields to South Shields, and not from one particular terminus to another. Fourthly, that the mere act of ferrying passengers was a disturbance of the franchise, although the franchise was not of a prescriptive ferry, to the exclusion of all private boats, but simply of a ferry. Fifthly, that, on the purchase of the ancient ferry and completion of the new ferry, the former became extinct by operation of the act of Parliament. *The North and South Shields Ferry Company v. Barker*, 136

FRAUD.

See SCIRE FACIAS.

GAMING AND WAGERING.

Contract made so by Statute, passed subsequent thereto.

The 18th section of the 8 & 9 Vict. c. 109, which received the royal assent on the 8th of August, 1845, enacts, that "all contracts and agreements by way of gaming or wagering shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event upon which any wager shall have been made:"—*Held*, per Parke, B., Alderson, B., and Rolfe, B., (*Platt*, B., dissentiente), that the statute had not a retrospective operation, so as to defeat an action for a wager, commenced before the statute passed.

Quere, whether, by the first part of the section, the Legislature intended to put at once an end to the legal obligation both of existing and future

wagering contracts, leaving the parties to all such wagers to act thereafter on them as honourable engagements alone.

The general rule in construing recent statutes is, "Nova constitutio futuris formam imponere debet, non præteritis;" but that rule, which is one of construction only, will yield to a sufficiently expressed intention of the Legislature that the enactment should have a retrospective operation. *Moon v. Durden*, 22

GENERAL ISSUE.

See PLEADING, II. (2).
TRESPASS.

GUARANTEE.

Construction.

In an action of assumpsit on a guarantee, the plaintiff, in support of an averment in the declaration, that he had executed a certain indenture, gave in evidence the following document, signed by the defendant:—"In consideration of your having by indenture agreed to accept payment of the debt owing to you by A. B., by the following instalments: that is to say, 10s. in the pound on the 18th day of August next, &c., I promise to guarantee the payment of the instalments." There was evidence, that, when A. B.'s creditors received the guarantee, they signed the deed at the same time:—*Held*, that, under the circumstances of the case, the true construction of the guarantee was, "that, if at some future time the plaintiff shall have released the debt, the defendant will guarantee the same to him;" and, therefore, that it did not prove the averment in the declaration. *King v. Cole*, 628

HORSE-DEALER.

See ASSESSED TAX.

IMMATERIAL ISSUE.

See PLEADING, III. (3).

INCLOSURE ACT.

Construction of.

Certain waste lands in the manor of Shipley, to the soil of which, and everything constituting the soil, the lord of the manor was entitled, were, by an Inclosure Act, 55 Geo. 3, c. xviii., (which recited the lord's title), taken away from the lord and allotted to commoners, except as saved by the 32nd clause. That clause reserved to the lord all mines and minerals, of what nature or kind soever, lying and being within or under the said commons and waste grounds, in as full, ample, and beneficial a manner, to all intents and purposes, as he could or might have held and enjoyed the same in case the said act had not been made; and enacted, that he should and might at all times thereafter have, hold, win, work, and enjoy exclusively all mines and minerals, of what nature or kind soever, within and under the said commons and waste grounds, with full liberty of digging, sinking, searching for, winning, and working the said mines and minerals, and carrying away the lead ore, lead, coals, iron-stone and fossils, to be gotten thereout: provided that the lord, in the searching for and working the said mines and minerals, should keep the first layer or stratum of earth separate and apart by itself, without mixing the same with the lower strata. The 33rd section provided for reimbursement to the owners of allotments, for injury done by searching for or working the mines and minerals:—*Held*, on error in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the reservation clause must be construed with reference to the title of the lord to the whole of the soil; and, inasmuch as the object of the act was to give to the commoners the surface for cultivation, and leave

INSOLVENT.

in the lord what it did not take away for that purpose, the word “minerals” must be understood, not in its general sense, signifying substances containing metals, but in its proper sense, as including all fossil bodies or matters dug out of mines, that is, quarries or places where anything is dug; and this notwithstanding the provision in the latter part of the clause, authorising the carrying away the “lead ore, lead, coal, iron-stone, and fossils,” as fossils may apply to stones dug in quarries: therefore, that the clause reserved to the lord the right to the stratum of stone in the inclosed lands. *Wainman v. The Earl of Ross*, 800

INROLMENT, ANNUITY.

See LUSACT.

INSOLVENT.

Protection, Final Order for, under 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96.

A final order for protection under the stats. 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, not only protects the person of the insolvent, but constitutes an absolute bar to an action for the debt as to which it is a protection, and may be so pleaded.

To an action of debt the defendant pleaded, that, after the passing of the 5 & 6 Vict. c. 116, and before the 7 & 8 Vict. c. 96, and before the commencement of the suit, a petition for protection from process was duly, according to the form of the statute, presented by the defendant to the Court of Bankruptcy, and afterwards filed in that court; and that thereupon, and after the passing of the said secondly-mentioned act, to wit, on &c., a final order for protection and distribution was made in the matter of the said petition by J. E., Esq., a commissioner of the said Court duly authorised; and that the said debts, &c., accrued before the issuing of the said petition.

INSURANCE.

Verification:—*Held* good, on special demurrer.

Where the goods of an insolvent had been seized under a writ of *fi. fa.* issued upon a judgment signed against him, and between the date of the judgment and the issuing of the writ of *fi. fa.*, he had obtained an order for protection and distribution, under the 5 & 6 Vict. c. 116, the Court, upon motion, set aside the writ on terms. *Jacobs v. Hyde. Platel v. Beville. Turner v. Pulman,* 508

INSURANCE.

See PLEADING, I. (3).

Risk, when terminated.

A vessel was insured "at and from Liverpool to Quebec, during her stay there, and from thence back to her discharging port in the United Kingdom, and until she had moored at anchor twenty-four hours in good safety." The vessel was chartered to take on board a cargo of timber at Quebec and to proceed therewith to Wallasey Pool, in the river Mersey, or as near thereto as she could safely get, and there discharge her cargo. The vessel sailed from Quebec on the 23rd July, 1845, and arrived in the Mersey on the 4th September, and anchored at the Bell Buoy. The next morning she was towed up by a steam-boat, and came abreast of Wallasey Pool; but, being unable to enter the pool by reason of her too great draft of water, the captain anchored, and proceeded to Liverpool to report the vessel, and engaged lumpers to discharge the cargo at a fixed rate of payment, which was to include the expense of rafting the timber from the vessel into Wallasey Pool, and discharged his crew, as was usual on a ship's arrival at Liverpool. He then proceeded to discharge the deck cargo, and afterwards a considerable portion of the other cargo, by the usual

JOINT-STOCK COMPANY. 853

mode, at the stern port; and after occupying in this way several days, the ship, on the 14th September, fell over and sustained damage. The captain always intended to take the vessel into Wallasey Pool with as much of the cargo on board as he could carry with safety:—*Held*, that, under the above circumstances, the underwriters were not liable, the vessel having been moored in safety twenty-four hours after her arrival at her port of discharge. *Whitwell v. Harrison,* 127

JOINT-STOCK COMPANY.

See SCIRE FACIAS.

(1). *Liability of Company on Contracts of Directors.*

Joint-stock Companies completely registered under the 7 & 8 Vict. c. 110, are bound by contracts made by a competent board of directors, though not under seal, or made in compliance with the requisites of the 44th section; though, *semble*, they cannot enforce such contracts.

But persons seeking to render those Companies liable on contracts made with the directors must shew their authority to bind the Company, either by the production of the registered deed of settlement, or by proof that the body of shareholders authorised particular individuals to make contracts binding on the Company. A ratification or admission by a competent board of directors will bind the Company. *Ridley v. The Plymouth, Stonehouse, and Devonport Grinding and Baking Company. The Kingsbridge Flour Mill Company v. Same,* 711

(2). *Execution against Shareholders.*

The return of the names of shareholders in a Joint-stock Company, pursuant to the 7 & 8 Vict. c. 110, is *prima facie* evidence of the fact of the parties named in the return being

LEASE.

Recital, when too large.

A declaration, after reciting that defendant was possessed, for the residue of a term of years, of a certain messuage and premises, and also of certain fixtures annexed to the premises, averred that the plaintiff agreed with defendant to purchase of him the residue of the term of the said messuage and premises, with the appurtenances and the said fixtures, and defendant, amongst other things, agreed to give up possession of the messuage, with the appurtenances and the said fixtures, on a certain day. The declaration then averred that plaintiff tendered to defendant, for execution, an instrument which, amongst other things, contained a recital that plaintiff had lately contracted with defendant for the sale to him of the residue of the term granted to him by one J. P., in the messuage or tenements and hereditaments, &c., with their appurtenances, and also *all and singular* the fixtures belonging to the said messuage or tenements and hereditaments, for a certain sum, the receipt of which was thereby acknowledged:—*Held*, on motion in arrest of judgment, that, as the agreement between the parties was for the assignment of the fixtures only, which belonged to the defendant, the recital in

son to suppose the party to be within the act. *Parrington v. Moore*, 223

MERGER.

See FERRY.

MESNE PROFITS.

See PLEADING, III. (2).

MINES AND MINERALS.

See INCLOSURE ACT.

MONEY HAD AND RECEIVED.

See AGREEMENT.

(1). *False Statement.*

The plaintiff sold for the defendant a horse, and received the price. The purchaser afterwards rescinded the contract on the ground of fraud, and was repaid the purchase-money. In an action by the plaintiff for the keep of the horse—*Held*, that the defendant could not set off the price as money received for his use, it having ceased to be so when the contract was defeated by the purchaser, although the defendant was ignorant of the fraud.

Any false statement knowingly made with a view to induce another to alter his condition, and thereby altering it, is a fraud in law. *Murray v. Mann*, 538

(2). *Demand before Action.*

A. & Co. agreed with a certain Company to build for them two steam-ships within a stated time, the price to be paid by instalments; provided that, if A. & Co. should make default in any of the conditions of the agreement, it should be lawful for the Company to take possession of the ships, and cause the works to be completed by any persons they chose, and pay those persons such reasonable sums as agreed upon, and that A. & Co. should *forthwith*, on

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demand, pay the Company all sums so advanced. Afterwards F. became a partner in the firm of A. & Co., and four instalments having been paid, and A. & Co. not being able to complete the ships, another agreement was made with the firm of A. & Co., including F., whereby the Company, in terms of the first contract, arranged to take possession of the ships and complete them, and for that purpose to take into their employ the workmen of A. & Co.; and, as a security to the Company for any advances they might make beyond the balance receivable by A. & Co., it was agreed that the Company should have a lien for such balance upon certain shares of A. & Co. in the Company. The Company having proceeded with the works, and for that purpose made large advances—*Held*, that they could not forthwith recover such advances by action against the firm of A. & Co., including F., for money paid or money had and received, there being no liability to repay until the ultimate balance was ascertained, and then only after demand. *The Royal Mail Steam-packet Company v. Acraman*, 569

MONEY PAID.

See ARBITRATION AND AWARD, (4).

NISI PRIUS.

See HEARING COUNSEL. PRACTICE, (7).

NOTICE OF DISHONOUR.

See BILLS OF EXCHANGE, (3).

NUL TIEL RECORD.

See PLEADING, II. (5).

OYER.

See PRACTICE, (1).

K K K

EXCH.

(59 Geo. 3, s. 51), enabled commissioners to make exchanges of land with the consent of the owners, whether tenants in fee simple or for life. Sect. 32 provided for the costs of partition; but there was no clause in terms authorising partitions. The 59 Geo. 3 received the royal assent on the 19th May, 1819, at which time C. was seised of an undivided moiety of certain land in M. for the life of K., the other moiety being vested in A. S. in fee. On the 2nd August, 1819, C. and A. S. made a claim in writing under the 41 Geo. 3, c. 109, in respect of the land so held by them as tenants in common; and on the 13th September, 1819, A. S. died intestate, leaving E. S. his heir. On the 11th August, 1826, the commissioners made their award, and thereby made certain allotments, numbered respectively on a map 13, 87, and 88, to C. and A. S., in respect of their interests in the open lands to be allotted and divided; and they also, under the head "Exchanges," allotted to E. S. an undivided moiety of certain land sought to be recovered in this action, as also of the said three pieces of land numbered 13, 87, and 88, the other moiety being therein stated to be already vested in E. S. in exchange for, as well the undivided moiety of the said E. S. in certain other old inclosed lands, which the commissioners thereby allotted to C., the other moiety

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he was acting as the agent of the partnership, and that the account was theirs. The mere circumstance, however, of the money deposited being partnership property, is not sufficient for that purpose. *Cooke and Farquar v. Seeley*, 746

PATENT.

See COVENANT.

Specification.

The specification of a patent for "a process or method of combining various materials so as to form stuccoes, plasters, and cements, and for the manufacture of artificial stones, marbles, &c. used in buildings," after stating the invention to consist in producing certain hard cements of the combination of the powder of gypsum, powder of limestone, and chalk, with other materials, such combinations being (subsequent to their mixing) submitted to heat, described the method or process of making a cement from gypsum, to consist in mixing with powdered gypsum strong alkali (ex gr., best American pearlsh) dissolved in a certain proportion of water, this solution to be neutralised with acid (sulphuric acid being the best), the mass to be kept in agitation, and the acid to be added gradually till the effervescence should cease; and then a certain proportion of water to be added (if other alkali were used, the quantity to be varied in proportion to its strength); and the mixture having been brought to a proper consistence by the further addition of powdered gypsum, to be dried in moulds, and finally subjected to a furnace capable of producing a red heat. The description of making the cement differed little from that of the preceding process.

The specification, after proceeding to state the mode of using the cement

so made, concluded by stating, that other alkalies and acids, besides those before mentioned, would answer the purposes of the invention, though not so well, and that the inventor claimed the method or process thereinbefore described:—*Held*, that the specification was bad; for that either the inventor claimed *all* acids and alkalies, or only those which would answer the purpose; in the former of which cases, as some acids and alkalies would not answer the purposes of the invention, the specification was therefore bad: and in the latter, it was bad for not specifying those acids and alkalies which would be found to succeed. *Stevens v. Keating*, 772

PAUPER PLAINTIFF.

See PRACTICE, (8).

PLEADING.

See BILLS OF EXCHANGE.
TRESPASS, (1), (2).

(1). *Debt, when maintainable.*

Debt lies on an express covenant for payment of a freehold rent charged on land conveyed in fee. *Varley v. Leigh*, 446

(2). *Joint and several Covenant.*

A joint and several covenant by A. and other persons, that "they or some or one of them," will pay a certain sum, may be declared upon as a covenant by A. to pay, and debt will lie on such a covenant. *Caldwell v. Becke*, 318

I. DECLARATION.

(1). *Deed—Profert—"Discharge."*

A declaration in covenant stated, that, by a deed made between B. of the first part, D. and A. of the second part, V. of the third part, and a Railway Company of the fourth part, after reciting that J. and E., on behalf of

the Company, agreed to purchase certain premises, it was witnessed, that, in consideration of a certain sum, B. agreed with the Company to sell them certain messuages and lands, and that B. would *deduce a good title* to the hereditaments, and the Company agreed with B. to pay the sum. Averment, that B. became bankrupt, and the plaintiffs were his assignees; that both they and he were willing to deduce a good title; that B. and all necessary parties were ready and willing to execute a proper conveyance of the said hereditaments to the Company, and would have deduced a good title and have executed a proper conveyance, but that the Company *discharged* them from deducing such title and executing such conveyance. Breach, that the Company would not prepare such proper conveyance for execution, or pay the sum of &c.:—*Held*, on special demurrer, that it sufficiently appeared that the deed was sealed by the defendants; also, that profert was unnecessary.

Held, also, on general demurrer, that the word “discharge” must be understood as a discharge legally operative—that is, by deed.

Quære, whether the deducing a good title was a condition precedent to the plaintiffs’ right of action? *Brymer v. The Thames Haven Dock and Railway Company*, 549

(2). *Uncertainty.*

A declaration against C. and A. stated, that the plaintiff had divers dealings and transactions with C. alone, and also with C. and A.; that divers accounts remained unsettled between the plaintiff and defendants; that the plaintiff had, for the accommodation of C., accepted divers bills of exchange; and thereupon, in consideration that the plaintiff then delivered to the defendants three acceptances as follows: 16*l.* 6*s.* at two months, 21*l.* 15*s.* 2*d.*

at three months, 26*l.* 7*s.* 11*d.*, dated the 7th of April, at five months, *as a full settlement of debts*, the defendants promised the plaintiff to return him the acceptances drawn by C., as follows: 28*l.* 15*s.* and 28*l.* Breach, that the defendant did not return the acceptances On special demurrer,—*Held* bad, for uncertainty. *Webster v. Crouch*, 555

(3). *In Action on Policy of Insurance.*

A declaration in covenant stated, that, by indenture between the plaintiffs and defendant, reciting that the defendant had effected with the plaintiffs an insurance on his life, he paying the annual premium of 49*l.* 8*s.* 4*d.* on or before the 24th of June in each year, the defendant covenanted with the plaintiffs to pay them the premiums and all other sums of money that should become due in respect of the policy, at the proper times for that purpose, and to do every other matter or thing which should be necessary for keeping on foot the policy. First breach: that defendant did not pay the plaintiffs the premiums which became due in respect of the policy, according to his covenant; but, on the contrary, although afterwards, to wit, on the 24th of June, 1847, a premium of 49*l.* 8*s.* 4*d.* became due, yet the defendant did not then, or at any other time, pay it. Second breach: that the defendant did not do all such matters and things as were necessary for keeping on foot the policy, but, on the contrary, although afterwards, to wit, on the 24th of June, 1847, it was necessary, in order to keep the policy on foot, that an annual premium should be paid within twenty-one days from that day, yet the defendant did not, within that period, or at any other time, pay it:—*Held*, on special demurrer, that both breaches were bad. *The North British Insurance Company v. Riky*, 687

(4). *On Scire Facias.*

A declaration in scire facias stated, that the plaintiff recovered against G., one of the public officers for the time being of certain persons united in copartnership for the purpose of carrying on the trade and business of bankers in England, of which copartnership G. was then a member, residing in England, and had been duly nominated, and before and at the commencement of the suit had been, and at the time of the judgment was, one of the public officers of the Company, a certain debt and costs, whereof G., as such public officer as aforesaid, is convicted, as by inspecting the rolls appears, &c.:—*Held*, on special demurrer, that the declaration was bad, for omitting to state that the debt recovered against G. was due and owing from the Company to the plaintiff. *Ness v. Fenwick*, 598

(5). *In Arrest of Judgment.*

In an action on the case against the sheriff, the declaration, after reciting that two writs of fi. fa. had been delivered to him to be executed, stated, that the defendant, as such sheriff, under colour of the writs, wrongfully and injuriously seized goods of the plaintiff, of much greater value than sufficient to pay and satisfy the sum of money, interest, poundage, &c., indorsed on the writs, although the defendants well knew that the money arising from a part of the goods so seized would be sufficient to satisfy the indorsement on the writs; yet the defendant, contriving &c., afterwards, under colour of the said writs, wrongfully &c. did sell and dispose of more goods than necessary to satisfy the indorsement on the writs; and the defendant, further disregarding his duty &c., then sold the said goods for a much less sum of money than he could, might, and ought to have sold the same:—

Held sufficient, on motion in arrest of judgment. *Gawler v. Chaplin*, 503

II. PLEA.

(1). *When bad after Verdict.*

To trespass de bonis asportatis by the assignees of L., a bankrupt, the defendants pleaded, that L., before his bankruptcy, being seised in fee of certain copyhold tenements, in consideration of 1400*l.*, covenanted to surrender them to the use of the defendants, subject to a proviso for redemption; and for better payment of the interest of the said sum of 1400*l.*, L. granted to the defendants, that as often as the interest should be in arrear for a certain time, it should be lawful for the defendants to enter and distrain for the same. The plea then averred the surrender and admittance of the defendants, and justified the seizure of the goods on the premises while in possession of L., as a distress for the interest in arrear:—*Held*, after verdict, that the plaintiffs were entitled to judgment non obstante veredicto, for, assuming the grant to operate as a rent-charge, it ceased to be so upon the admittance of the mortgagees; and that afterwards it could only take effect as a covenant, binding such goods of the bankrupt as might happen to be on the premises at the time of the distress. *Freeman v. Edwards*, 732

(2). *When bad as amounting to the General Issue.*

1. To an action for money had and received, the defendant pleaded, that the money was received by him and others, the provisional committee of a railway, as a deposit upon shares allotted to the plaintiff, who, with the defendant, the committee, and other subscribers, agreed to form a partnership for carrying on the undertaking. That, after the passing of the 9 & 10 Vict. c. 28, the provisional committee

in pursuance of that act called a meeting, and an adjourned meeting of shareholders, for the purpose of determining whether the Company should be dissolved, and whether such dissolution should be taken to be an act of bankruptcy, when the majority of votes were in favour of such dissolution, and against the same being taken to be an act of bankruptcy; and thereupon the dissolution of the Company became complete, and the carrying into effect of the undertaking finally ceased, and the affairs of the Company became liable to be wound up; that the sum sought to be recovered was part of the affairs of the Company to be so wound up; that they had not in any manner been wound up, nor had a reasonable time elapsed for the winding up of the same:—*Held*, on special demurrer, that the plea was bad, as amounting to the general issue. *Coupland v. Challis*, 682

2. A declaration stated, that it was agreed between the plaintiffs and the defendant that the defendant should buy of the plaintiffs, and the plaintiffs sell to the defendant, 1000 barrels of flour, to arrive at Liverpool by a vessel called the Hottinguer from New York; that, should the vessel be lost before arriving at Liverpool, the sale should be void. Averment, that the vessel was not lost, but did arrive at Liverpool from New York, having on board 1000 barrels of flour. Breach, that the defendant would not accept the flour. Plea, that the Hottinguer was one of a line of packet ships sailing from New York to Liverpool at fixed periods, published and known beforehand amongst merchants at Liverpool: that the Hottinguer was to have set sail from New York for Liverpool three weeks before the said agreement, and was at the time of the agreement expected to arrive at Liverpool within a week after, and that it had been published, and was believed amongst merchants at Liverpool, that

the vessel was to arrive there in the course of the said voyage, and that the vessel was then performing such voyage, which was the voyage in this plea mentioned: that the plaintiffs had notice of the premises, and made the agreement with reference to the voyage in this plea mentioned, and under the belief that the Hottinguer had sailed from New York: that the Hottinguer had not at the time of the agreement, nor did she at any time, set sail on the voyage in the plea mentioned; but the proprietors of the said line of packet ships had, without the knowledge of the plaintiffs or the defendant, substituted another vessel for the Hottinguer, for the performance of the said voyage, which vessel afterwards arrived at Liverpool: by reason whereof the defendant refused to accept and pay for the flour:—*Held*, that the plea amounted to an argumentative denial of the contract set out in the declaration, and was therefore bad on special demurrer. *Mounsey v. Perrott*, 522

(3). *To Bill of Exchange.*

Assumpsit by indorsee against acceptor of a bill of exchange for 100*l*.

Plea, that after the said bill of exchange had become due and payable, W. (one of the drawers) delivered to the plaintiff, at his request, certain bills of exchange for the payment of certain sums of money therein mentioned, and amounting in the whole to more than the said sum of 100*l*., and to a large and sufficient sum of money, to wit, 380*l*., for and on account of, amongst other things, the sum specified in the said bill of exchange in the declaration mentioned, and all damages, &c.; which said bills of exchange the plaintiff took and received from W. for and on account of, amongst other things, the said sum of money in the declaration mentioned, and all damages, &c.; and that the said bills of exchange were paid and satisfied before the commencement

of this suit, to wit, when they became due. Replication, that they were not paid and satisfied, *modo et formá*. Verdict for the defendant on this issue:—*Held*, on error in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the plea was bad in substance, and that the plaintiff was entitled to judgment non obstante veredicto. *Williams v. James*, 798

(4). *Matter of Aggravation.*

In trespass for breaking and entering the plaintiff's dwelling-house, and seizing, taking, and converting his goods, the conversion is mere matter of aggravation; and a plea which only justifies the seizing and taking is good on special demurrer, though it does not in its commencement except the conversion. *Pratt v. Pratt*, 413

(5). *Nul tiel Record, Plea of.*

In debt on a judgment, the declaration alleged that the plaintiff recovered 19*l.* 9*s.* debt, and 33*l.* costs. On plea of nul tiel record, it appeared that the judgment was for 19*l.* 9*s.* debt, 1*s.* damages, 40*s.* costs, and 33*l.* 19*s.* costs of increase:—*Held*, that the defendant was entitled to judgment on the plea, and that there must be a separate application to amend. *Billing v. Hutchins*, 297

(6). *Plea to Scire Facias on Judgment recovered by Public Officer of Banking Copartnership—when bad.*

A declaration in scire facias on a judgment recovered by E., the public officer of the London and Westminster Bank, against the public officer of the Leeds and West Riding Banking Company, for the sum of 51,373*l.* 12*s.* 7*d.*, having been demurred to, the plaintiff amended, and, within two days after the amendment, the defendant pleaded in abatement, that, at the very same time when the writ issued, and before E. declared, E., then being pub-

lic officer, issued a writ of scire facias against D., another member of the Company, at the time of judgment recovered. The plea set out the writ and declaration, and averred that the judgment mentioned in the two writs of scire facias were one and the same judgment; and that, at the time of the recovery of the judgment and the issuing of the writ of scire facias against the defendant, D. was a member of the copartnership. It then averred the identity of the Companies, and that D. was alive, and the suit against him still pending. The affidavit in verification of this plea stated, that the paper-writing thereto annexed was a true copy of the issue, wherein E., as such public officer, was plaintiff, and D. defendant; and that judgment was signed in such action by E. against D., on &c., for the sum of 51,373*l.* 12*s.* 7*d.* The plaintiff having signed judgment, on the grounds that the defendant was not entitled to plead in abatement, and that the affidavit of verification was insufficient:—*Held*, that the judgment was regular, inasmuch as the affidavit did not state even the defendant's belief that the two writs issued at the same time. But *semble*, that the defendant was entitled to plead in abatement. *Esdaile v. Trustwell*, 312

(7). *Semble, when bad.*

To debt for money had and received, &c., the defendant pleaded, by way of set-off, that the plaintiff was indebted to him in 149*l.* 14*s.* 6*d.*, upon a judgment recovered in the Court of Exchequer, which the defendant was ready to verify by the record, and in 43*l.* 12*s.* on a promissory note, and in 500*l.* for work and labour, money lent, &c. The plaintiff replied, that he was not nor is indebted, by reason that, as to 149*l.* 14*s.* 6*d.*, there was not any record of the said recovery, and that he was ready to verify when, where, and in such manner as the Court should appoint; and by reason that, as to the

residue other than the said sum of 14*l.* 14*s.* 6*d.*, the plaintiff was not indebted to the defendant; concluding to the country:—*Semble*, that the plea and replication were bad. *Turnbull v. Bell*, 793

III. REPLICATION.

(1). *Assets quando.*

The judgment of assets quando acciderint embraces not only the assets received by the executor after that judgment is signed, but also such assets as came into or ought to be in his hands between the issuing of the writ, or the plea, and the judgment, in the due course of administration.

To an action of assumpsit against the defendant as executor, the defendant pleaded plene administravit præter 10*l.*, which was not sufficient to satisfy a specialty debt. The plaintiff replied, that after the commencement of the suit, and after plea pleaded, certain goods of the deceased had come into the executors' hands, in value above the sum of 10*l.*, wherewith the defendants ought to have satisfied the causes of action mentioned in the declaration:—*Held* bad, on general demurrer, as unnecessary and unprecedented; and that the proper course was to take the ordinary judgment of assets quando acciderint. *Smith v. Tateham*, 205

(2). *Replication in Action for Mesne Profits.*

To a declaration in trespass for mesne profits, stating the entry and expulsion on the 10*th* of December, 1844, and the expulsion and taking of profits to have been continued till the 10*th* of March, 1846, the defendant pleaded, that the closes in which &c. were not, nor were any of them, or any part thereof, the plaintiff's modo et formâ. The plaintiff replied to the whole plea, by way of estoppel, a recovery by the plaintiff against the casual ejector on a declaration in ejectment, stating the demise

to have been on the 14*th* of October, 1845, for a term of twenty years; and the replication concluded with a prayer of judgment if the defendant, during that term, ought to be admitted, against the said recovery, record, and proceeding, to plead that plea:—*Held*, on special demurrer, that the replication applied only to part of the time of the trespass complained of in the declaration, and was therefore bad.

Quære, whether judgment by default against the casual ejector can be pleaded as an estoppel; and if so, whether it can be replied to a plea like the present, which contains no new matter. *Doe v. Wellman*, 368

(3). *To Payment of Money into Court—Immaterial Issue.*

To an action of debt on the common counts, the defendant pleaded, except as to 30*l.*, never indebted; and as to 30*l.* and the causes and cause of action in that respect, payment into court of 30*l.* and 6*d.*, and that the defendant never was indebted to plaintiff in a greater amount than 30*l.* in respect of the causes of action in the introductory part of the plea mentioned; and that plaintiff had not sustained damages by reason of the non-payment thereof to a greater amount than 6*d.* Replication, that the defendant was indebted to plaintiff in a greater amount than the said sum, in respect of the causes of action in the declaration mentioned. Issue thereon:—*Held*, on motion for a new trial, that, whether the issue was immaterial, or whether it raised the same issue as that raised by the first plea, in either case it did not vitiate the proceedings, and was no ground for a new trial. *Hunt v. Cox*, 606

(4). *To Plea to Promissory Note.*

To an action by indorsee against indorser of a promissory note for payment of 750*l.*, the defendant pleaded, that he indorsed the note to P. for a special purpose, and that P., in viola-

tion of that purpose, delivered it to the plaintiff, and that there never was any consideration or value from the plaintiff to the defendant, or P., for the transfer of the note by P., or for the plaintiff being the holder of the same. Replication, that there was good value and consideration for the plaintiff's being the holder of the note; to wit, a large sum of money, to wit, the sum of 750*l.*:—*Held*, on special demurrer, that the replication was good. *May v. Seyler*, 563

(5). *Conclusion of.*

Plea of privilege by an attorney, alleging that he was an attorney of the Court of Queen's Bench, and not an attorney of the Court of Exchequer. Replication, that the defendant was an attorney of the Court of Exchequer; concluding to the country:—*Held* bad, on special demurrer, for not concluding with a verification by the record. *Graham v. Ingleby*, 442

POLICY OF INSURANCE.

See PLEADING, I. (3).

POOR'S RATE.

Warrant of Distress, when bad.

The stat. 43 Eliz. c. 2, s. 4, which gives a remedy for the levying of money assessed for poor-rates, does not extend to costs; and the 18 Geo. 3, c. 19, s. 1, under which justices have power to award costs in such a case, limits the period for which the defaulter can be imprisoned to the term of one month.

A warrant issued by two justices of the county of S., after reciting the making of a rate, the assessment of the plaintiff in the sum of 17*l.* there-to, and his refusal to pay the same, and that R. H. and L. W., two justices &c., had issued their warrant to levy the said sum of 17*l.* 19*s.* 6*d.*, and the further sum of 6*s.* for costs incurred in the premises, making in the

whole the sum of 18*l.* 5*s.* 6*d.*, by distress, &c., commanded the constable to apprehend and take the plaintiff to the House of Correction, there to remain "until payment of the said sum:—" —*Held*, that the warrant was bad in toto; and that an action of trespass lay against the justices and the constable for the arrest and imprisonment under it.

The backing of the warrant under 24 Geo. 2, c. 55, s. 1, by a justice is purely ministerial, and the justice who issues the warrant is responsible for an arrest under it, although it be backed and executed in a county other than that in which it was issued.

A demand of the copy and perusal of the warrant, signed by the plaintiff's attorney, was left by his clerk:—*Held*, a sufficient demand under 24 Geo. 2, c. 44, s. 6.

Where the plaintiff had obtained a copy of the warrant previously to a demand thereof—*Held*, that the constable was not thereby excused from complying with the demand.

The mere fact of the justices being joined in the action against the constable, does not entitle the constable to a verdict under the 24 Geo. 2, c. 44, s. 6, which section only protects him in case he has complied with the demand of a copy and perusal of the warrant.

A party having been arrested under the foregoing warrant, and having paid under protest the money specified in it—*Held*, that he was entitled to recover back the whole of the money so paid, although the 17*l.* 19*s.* 6*d.* was really due from him in respect of the rate. *Clark v. Woods*, 395

PRACTICE.

See VENUE.

(1). *Time for Pleading in Abatement after Oyer.*

A defendant has the same time for

pleading in *abatement* after oyer granted of an instrument stated in the declaration, as he had at the time of the demand of oyer. *Kerfoot v. Edwards*, 196

(2). *Rule to plead several Matters—When Plaintiff entitled to sign Judgment.*

A defendant obtained a rule to plead, with other pleas, "as to the sum of 100*l.*, parcel &c., that the defendant indorsed and delivered to the plaintiffs a bill of exchange for 100*l.*, which the plaintiffs received in satisfaction of the said sum of 100*l.*" The plea delivered was, "as to the sum of 100*l.*, parcel &c., the defendant, for and on account of the said sum of 100*l.*, indorsed and delivered to the plaintiffs a bill of exchange for 100*l.*, drawn by the defendant and accepted by T., and the plaintiffs took and received the said bill for and on account of the said sum; and that the defendant had not due notice of the non-payment of the said bill:"—*Held*, that the plea was not authorised by the rule to plead, and that the plaintiffs were entitled to sign judgment. *Hills v. Haymen*, 323

(3). *Special Demurrer—Marginal Note.*

The rule of Hil. Term, 4 Will. 4, which requires, that "in the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated," applies to special as well as to general demurrers. And, if such points be wanting, the Court will set the demurrer aside as irregular. *Bouguerean v. Brett*, 483

(4). *Irregular Issue.*

On the 20th March, a defendant, under terms of rejoining gratis, and taking short notice of trial for the next assizes, pleaded a set-off. On the 25th March the plaintiff delivered a replication of the Statute of Limita-

tions, and demanded a rejoinder. In the evening of the 29th March, which was the commission-day, the defendant delivered a rejoinder, but, in consequence of the office closing at three o'clock, the plaintiff inserted a rejoinder different in form but similar in substance to the defendant's, made up the issue, and passed the record. The defendant did not appear at the trial, and the plaintiff having obtained a verdict, the Court set aside the issue, *Nisi Prius* record, and trial.

"Rejoining gratis," means rejoining within four days without a rule for that purpose, and not rejoining within twenty-four hours after demand. *Winterbottom v. Lees*, 325

(5). *Summons, when no Stay of Proceedings.*

A defendant served two consecutive summonses for leave to plead several matters, neither of which was attended by the plaintiff. On the return of the second summons, on which day the defendant's time for pleading expired, he took out and served a third summons, returnable the following day. The plaintiff did not attend this summons, but signed judgment after it was returnable:—*Held*, that the third summons was no stay of proceedings, and that the judgment was regular. *Hawkins v. Wilkinson*, 345

(6). *Side-bar Rule for view.*

An action for work and labour as a bricklayer, is not a case in which a side-bar rule for a view ought to be granted.

Semble, that such rule, omitting the names of the shewers, and the time and place of meeting, is irregular. *Stones v. Menhem*, 382

(7). *Hearing several Counsel.*

Where several defendants appeared

PROMISE.

by several counsel, it is a matter for the discretion of the presiding judge whether he will allow more than one counsel to be heard. *Semble*, that where one defence alone is relied on, the better rule is, that one counsel only ought to be heard. *Nicholson v. Brooke*, 213

(8). *Settlement of Action by Pauper Plaintiff, when allowable.*

Where a pauper plaintiff settles the action behind the back of his attorney, it is entirely a question for the discretion of the Court, under the particular circumstances of the transaction, whether they will interfere and set aside the proceedings.

Where a pauper plaintiff settled the action behind his attorney's back, by executing a release, but it appeared that he was the first to make the application, and that the arrangement was fair and reasonable, the defendant having pleaded a plea of release puis darrein continuance, the Court refused to set aside the deed and the plea at the instance of the attorney. *Jones v. Bonner*, 230

PRIVILEGE.

See COUNTY COURT, (5).
EVIDENCE, (6).

PROBATE.

See EXECUTOR.

PROFERT.

See PLEADING, I. (1).

PROHIBITION.

See COUNTY COURT, (5).

PROMISE.

See BANKRUPT, (1).

RECAPTION.

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PROTECTION.

Final Order for, under 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96.—Plea of.—Service of, Effect after Final Order.

See INSOLVENT.

Protection and Liberation under Scotch Sequestration Act.

See SEQUESTRATION.

PUBLIC OFFICER.

See PLEADING, II. (6).

RAILWAY COMPANY.

See ALLOTMENT.

CALL.

CARRIERS' ACT.

DEED.

Liability of Company by reason of Accident arising from Failure of Works on Line.

In an action against a Railway Company, for compensation for injury received by the plaintiff by the breaking down of a bridge, over which he was passing in a passenger train,—*Held*, that it was a proper question for the jury, whether the defendants had engaged the services of competent engineers, who had adopted the best method, and had used the best materials; and that, if the defendants had done so, they would not be liable; but that the mere fact of their having engaged the services of such a person, would not relieve them from the consequences of an accident arising from a deficiency in the work. *Grote v. Chester and Holyhead Railway Company*, 251

RATIFICATION.

See TRESPASS, (1).

RECAPTION.

See ESCAPE.

See EXECUTOR.

REPLEVIN.

See ASSESSED TAX.

REVENUE.

Removal of Cause.

A vessel having a quantity of arms on board was seized in the port of London by the defendants, officers of Customs, but was afterwards unconditionally restored. An action of trespass having been brought against the defendants for the seizure, in the Court of Common Pleas, a rule was made absolute in the first instance, on the suggestion of the Attorney-General, and without affidavit, to remove the cause into this Court. *Adams v. Sir Thomas Fremantle, Bart.*, 453

SCIRE FACIAS.

See PLEADING, I. (4); II. (6).

Although, as a general rule, an application made upon defective materials cannot be repeated upon amended materials, except in cases where the affidavits are wrongly intitled, or have a defect in the jurat; yet, where a rule to issue a scire facias upon a judgment recovered against the public officer of a Joint-stock Banking Company had been obtained against a former mem-

SHARE.

SEALED REGISTER.

See CALL.

SEQUESTRATION ACT, 2 & 3 VICT, c. 4.

Protection and Liberation.

The Scotch Sequestration Act (2 & 3 Vict. c. 41) provides for two distinct species of warrants to be granted by the Lord Ordinary, one for the *protection* of the debtor from arrest, the other for his *liberation* when in custody. Thus a warrant which recites that the Lord Ordinary had considered the petition of A. B., and sequestrates his estates, and declares them to belong to his creditors, and appoints the creditors to hold two meetings at a certain time and place, to elect interim factors and trustees, and remits to the sheriff, to proceed according to the statute, and "*grants a warrant of protection to the said A. B. against arrest or imprisonment for civil debt, until the meeting of the creditors for the election of a trustee,*" is a warrant of *protection* only, and therefore a party in custody at the time the warrant is obtained is not entitled under it to his discharge. *M'Gregor v. Fishen*, 226

SERVANT.

See CARRIERS' ACT.

SET-OFF.

A defendant cannot set off, by plea to the further maintenance of the action, a debt which accrued after action brought, and before plea pleaded. *Richards v. James*, 471

SETTLEMENT OF ACTION BY PAUPER PLAINTIFF.

See PRACTICE, (8).

SHARE.

See BANK.

STATUTE.

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SHAREHOLDER.

See CALL.

Execution against Shareholder of Joint-stock Company.

See JOINT-STOCK COMPANY.

SHERIFF.

See ATTORNEY.

PLEADING, I. (5).

Action against for Excessive Distress.

See PLEADING.

SLAVES — TRESPASS WHEN MAINTAINABLE FOR.

See TRESPASS.

SPECIFICATION.

See PATENT.

STAMP.

See BILLS OF EXCHANGE.

(1). *Agreement.*

An agreement made in 1840, when the 55 Geo. 3, c. 184, required a 1*l.* stamp, was, subsequently to the 7 & 8 Vict. c. 21, stamped under a penalty with a 2*s.* 6*d.* stamp:—*Held*, that the agreement was admissible in evidence. *Deakin v. Penniell*, 320

(2). *When ad valorem Stamp necessary.*

"Memorandum, that T. has sold to G. all the goods, stock-in-trade, and fixtures in a certain shop:"—*Held*, to require an ad valorem stamp as a conveyance.

Any instrument which operates as a record of the transfer of property is a conveyance within the Stamp Act. *Horsfall v. Hey*, 778

STATUTE — RETROSPECTIVE OPERATION.

See GAMING AND WAGERING.

Co. For the amount of the purchase on their credit, L., S., & Co. drew bills on B. & Co., and the coffee they shipped on board a vessel of B. & Co., bound for "Cork and a market." An invoice was made out, stating the coffee to be shipped by order and on account and risk of B. & Co.; but L., S., & Co. procured the captain to sign bills of lading, making the coffee deliverable to their order or assigns "freight free." One of these bills they indorsed in blank, and transmitted by post to B. & Co. on the 21st of September. At the end of September, A. W., the agent in England of L., S., & Co., asked the principal partner in the firm of B. & Co. to cause the bill of lading to be placed in third hands, to secure the bills drawn on account of the purchase, to which he agreed, and on the 16th of October gave a written order to that effect. On the 12th of November, which was after B. & Co. had committed an act of bankruptcy, the bill of lading arrived, and was, in pursuance of the above-mentioned agreement, delivered to A. W. for the above-mentioned purpose, who, after the fiat, pledged it for a large advance with the plaintiffs, merchants at Rotterdam. The cargo having afterwards arrived, the assignees got possession of it, and trover was brought by the plaintiffs, as indorsees of the bill of lading:—*Held*,

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TESTE OF WRIT OF CERTIORARI.

See COUNTY COURT, (1).

TITHES.

Exemption—Discharge, under 2 & 3 Will. 4, c. 100.

The enjoyment of land producing titheable matters, without payment of tithe, for the period prescribed by the 2 & 3 Will. 4, c. 100, if adverse and as of right, creates a valid and indefeasible exemption from and discharge of tithes.

But the non-payment of tithes of a particular thing for such period, in respect of lands for which tithes of other titheable produce have been paid within the statutable period, does not operate as an exemption from the payment of the tithes of that particular thing. *Salkeld v. Johnson*, 256

WRIT OF ERROR.

When it does not lie.

Error does not lie on a judgment of a superior Court, upon a feigned issue brought under the 46th section of the Tithe Commutation Act, 6 & 7 Will. 4, c. 71; and the Court of Exchequer Chamber quashed a writ of error so brought. *Thorpe v. Plowden*, 387

TOWN.

Meaning of the Word in the Railway Clauses Consolidation Act.

On the trial of an issue whether a railway was passing through a "town" within the meaning of the Railway Clauses Consolidation Act (8 & 9 Vict. c. 20, s. 11), the judge merely told the jury that the word "town" was to be understood in its ordinary and popular sense:—*Held*, a misdirection, inasmuch as the judge ought to have given such a definition of the word "town" as would have enabled the jury to decide

the issue. "Town," in that act, means a collection of inhabited houses so near to each other that they may reasonably be said to be continuous, and the term will include a space of open ground surrounded by continuous houses; and, *semble*, all open spaces occupied as mere accessories to such houses, although not so surrounded. *Elliott v. The South Devon Railway Company*, 725

TRESPASS.

See MALICIOUS TRESPASS ACT.

PLEADING, II. (4).

The defendant, a naval commander, stationed on the coast of Africa, with instructions to suppress the slave trade, was requested by the governor of Sierra Leone to obtain the liberation of two British subjects detained as slaves at the Gallinas by the son of the king of that country, and in effecting that object to use force, if necessary. He accordingly proceeded to the Gallinas with an armed force, and, having landed at Dombocorro, took military possession of a barracoon belonging to the plaintiff, who was a Spaniard, carrying on the slave trade at the Gallinas. He then communicated with the king of the country, and the two British subjects having been released, the defendant concluded a treaty for the abolition of the slave trade in that country. In execution of this treaty, the defendant fired the barracoons of the plaintiff, and carried away his slaves to Sierra Leone, where they were liberated. Some of the plaintiff's goods, used in the slave traffic were claimed by the king as forfeited, and delivered up to him; other goods were destroyed. These proceedings having been communicated to the Lords of the Admiralty, and the Secretaries of State for the Foreign and Colonial Departments, they respectively, by letter, adopted and ratified the act of the defendant:—*Held*, first, that the plaintiff had a pro-

was equivalent to a prior command, and rendered it an act of state, for which the Crown was alone responsible, (*Parke, B., dubitante*): and that such defence was open under the general issue. *Burton v. Denman*, 167

Evidence admissible under Traverse that the Close was the Plaintiff's.

Under the plea to a declaration in trespass, qr. cl. fr., that the close in the declaration mentioned was not, at the time when &c., the close of the plaintiff, the defendant may shew a lawful right to the possession of the close, either in himself or in some other person under whose authority he claims to have acted. So held on error, in the Exchequer Chamber, per *Wilde, C. J., Colman, J., Maule, J., Erle, J., and Williams, J.*,—dissentientibus, *Cole-ridge, J., and Wightman, J.* *Jones v. Chapman*, 803

TROVER.

What sufficient to pass Property.

The defendant, a corn-factor, residing at Bristol, in December, 1846, wrote to one L., at Plymouth, requesting samples of barley, and to make him an offer of a cargo. In the same month L. wrote to defendant, and sent samples of barley, and offered to sell defendant from 400 to 500 quarters f. o. b., at Kingsbridge, or some neighbouring port, for a certain sum, for

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VENDOR.

tain property for a certain period, and at the expiration of the agreement, the property should be given up to the plaintiff:—*Held*, that the words the “said parties hereto” meant the defendants only, and therefore, that the plaintiff was not a partner with the defendants in the goods.

The goods having been, during the term, applied by the defendants to a purpose in contravention of the agreement, and not having been redelivered by them at the end of the term:—*Held*, that the bailment had been determined, and that the plaintiff might maintain trover. *Bryant v. Wardell*, 479

TRUCK ACT.

Who is a Workman or Labourer within the Meaning of the Act.

A person who takes a contract to execute a certain cutting on a railway, at a certain sum per cubic yard, and employs several men under him to assist in doing the work, is not a *workman* or *labourer* within the true meaning of the 1 & 2 Will. 4, c. 37, (the Truck Act), although he does a portion of the work himself.

Where the earth removed is clay, which is used for making bricks, *Quære*, whether a labourer engaged in the removal of such earth is a person “employed in or about the working or getting of clay,” within the meaning of the 19th section of the Act. *Riley v. Warden*, 59

VARIANCE.

See PLEADING, II. (5).

VENDOR.

See LEASE.

WRIT OF EXTENT. 871

VENUE.

Undertaking to give Material Evidence.

An undertaking to give material evidence of some matter in issue, arising in a particular county, is satisfied by evidence arising in that county, which bears upon the amount of damages.

Therefore, in an action for negligent driving, whereby the plaintiff was injured, and suffered loss in his business as an attorney:—*Held*, that the production of the roll of attorneys in Westminster, containing the name of the plaintiff, satisfied the undertaking to give material evidence in that county. *Jones v. Smith*, 451

WAGER.

See GAMING AND WAGERING.

WARRANT OF DISTRESS.

When bad—*Backing*, under 24 Geo. 2, c. 55—*Demand of Copy and perusal of*, under 24 Geo. 2, c. 44, s. 6.

See POOR RATE.

WARRANT OF PROTECTION AND LIBERATION.

See SEQUESTRATION ACT.

WORKMAN, WITHIN MEANING OF THE TRUCK ACT.

See TRUCK ACT.

WRIT OF ERROR.

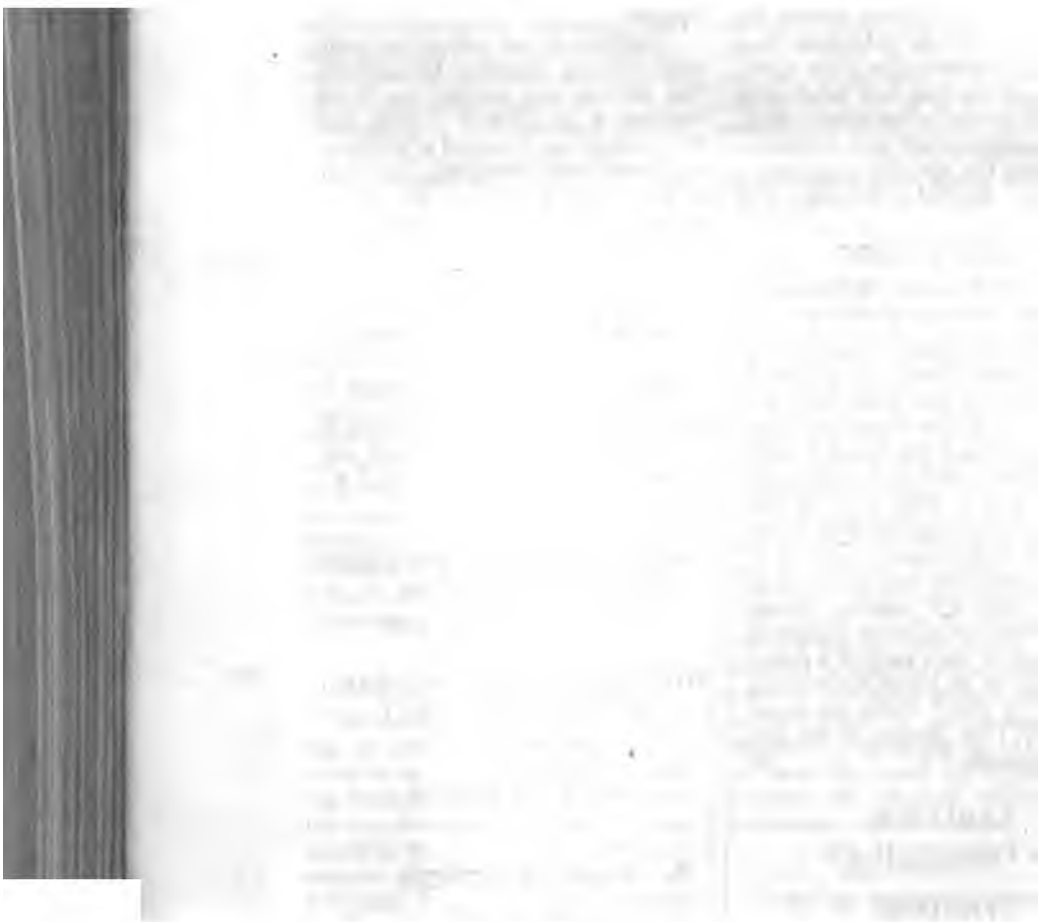
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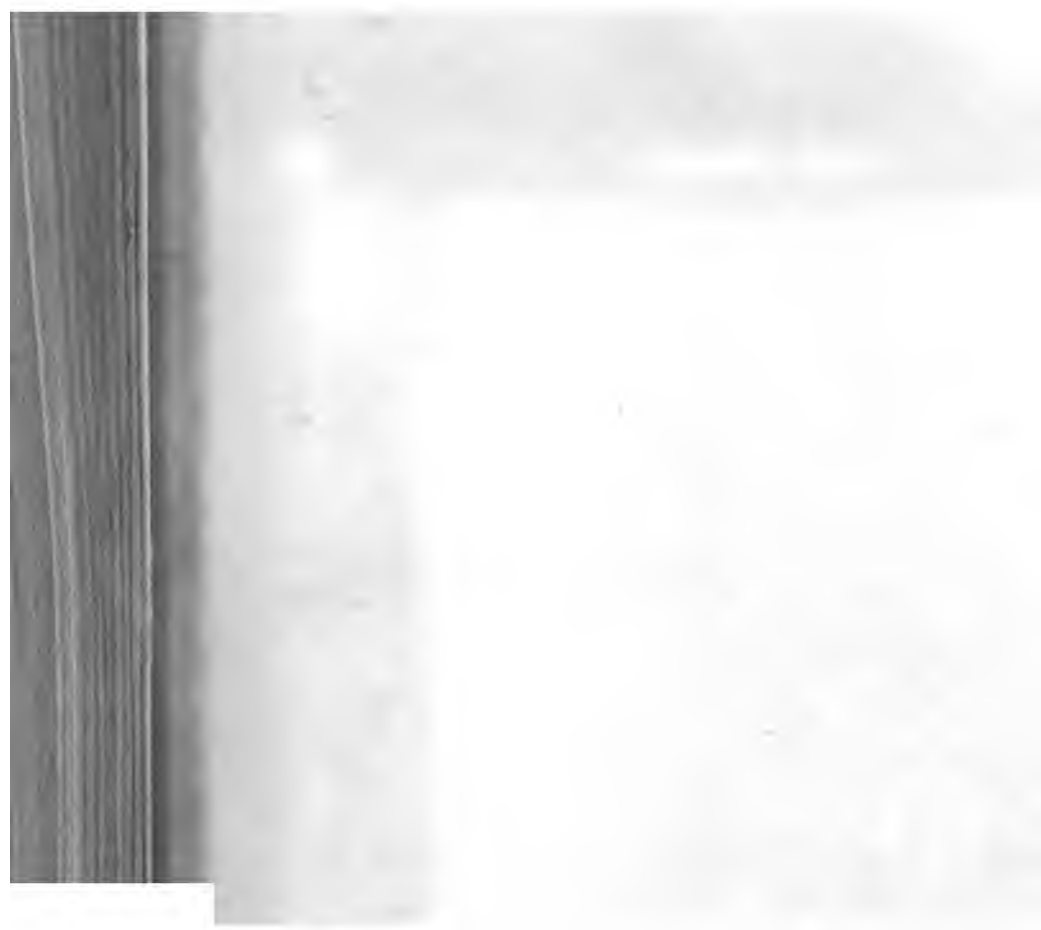
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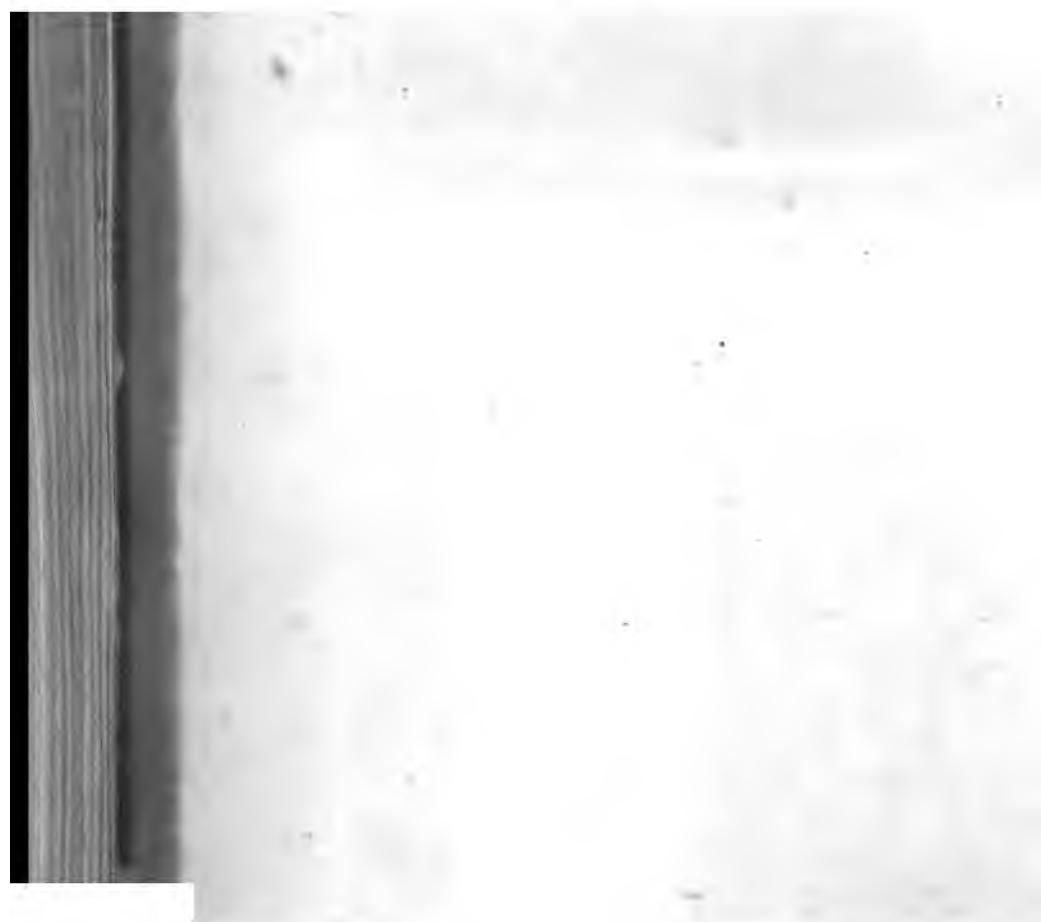
When returnable.

See ESCAPE.

END OF VOL. II.







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